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A DIGEST OF  
THE LAW OF EVIDENCE



A  
DIGEST OF  
THE LAW OF EVIDENCE

BY THE LATE  
SIR JAMES FITZJAMES STEPHEN, BART.,  
K.C.S.I., D.C.L.

ONE OF THE JUDGES OF THE HIGH COURT OF JUSTICE  
AND AN HONORARY FELLOW OF TRINITY COLLEGE, CAMBRIDGE

TWELFTH EDITION (REVISED)

BY

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## PREFACE TO THE TWELFTH EDITION

IT is now sixty years since this work was originally published, and the preparation of the twelfth edition has been made the occasion for carrying out the thorough revision of the whole book that any standard work requires from time to time. The Editors have not altered the form and arrangement of the work. They have been careful to preserve unaltered as far as possible any Article which has been treated as authoritative either by citation in court or comment in contemporary text-books. They have been careful so to express themselves that where any opinion stated or comment made is that of the Author, this fact shall be obvious. They have, of course, done their best to indicate the effect of any decided cases or legislative enactments that have affected or illustrated the law in recent times. But they have on occasion cited older authorities to which the Author did not refer in the original work or in the editions which he himself prepared. The reason for this is that, in circumstances mentioned in the Introduction, the work was originally planned as a reduction of a body of law to the form of a code, in which certain well-known rules could be stated without quoting authority; whereas to-day it ranks as a text-book in which the reader expects to find authority for every statement for which authority exists. The result is that the number of cases cited has been considerably increased; but care has been taken to avoid duplication, and to keep the number of cases referred to within the narrowest possible compass. Some Articles have necessarily been added; other

have been divided and re-arranged so as to contain new matter without confusion; and consequently, there has been a slight increase in their number. The labour bestowed on additions has been in inverse proportion to their bulk, and it is hoped that this edition, while following the model of brevity and clarity provided by the original work, will enable those using it to keep in touch with the latest developments of the law.

The Author's Introduction is printed as it left his hands. The Appendix is new. It is designed to deal more fully and in a modern form with some of the matters which the Author touched on in his Introduction to this work and in the Introduction to his code for India, which is now the Indian Evidence Act. While the senior Editor is not entitled to credit for such merits as it may possess, his junior colleague is alone responsible for its defects.

H. L. STEPHEN  
LEWIS F. STURGE

*February 1936*

#### EDITOR'S NOTE

The opportunity of a reprint has been used to subject the text to revision so as to embody recent changes in case law and statute (including the Evidence Act, 1938).

I would like also to place on record the great loss which the Digest and the profession generally have sustained by the death of Sir Harry Stephen which occurred last year.

LEWIS F. STURGE

*April 1946*

## INTRODUCTION

IN the years 1870-71 I drew what afterwards became the Indian Evidence Act (Act 1 of 1872). This Act began by repealing (with a few exceptions) the whole of the Law of Evidence then in force in India, and proceeded to re-enact it in the form of a code of 167 sections, which has been in operation in India since September 1872. I am informed that it is generally understood, and has required little judicial commentary or exposition.

In the autumn of 1872 Lord Coleridge (then Attorney-General) employed me to draw a similar code for England. I did so in the course of the winter, and we settled it in frequent consultations. It was ready to be introduced early in the Session of 1873. Lord Coleridge made various attempts to bring it forward, but he could not succeed till the very last day of the Session. He said a few words on the subject on August 5th, 1873, just before Parliament was prorogued. The Bill was thus never made public, though I believe it was ordered to be printed.

It was drawn on the model of the Indian Evidence Act, and contained a complete system of law upon the subject of evidence.

The present work is founded upon this Bill, though it differs from it in various respects. Lord Coleridge's Bill proposed a variety of amendments of the existing law. These are omitted in the present work, which is intended to represent the existing law exactly as it stands. The Bill, of course, was in the ordinary form of an Act of Parliament. In the book I have allowed myself more freedom of

expression, though I have spared no pains to make my statements precise and complete.

In December 1875, at the request of the Council of Legal Education, I undertook the duties of Professor of Common Law, at the Inns of Court, and I chose the Law of Evidence for the subject of my first course of lectures.

It appeared to me that the draft Bill which I had prepared for Lord Coleridge supplied the materials for such a statement of the law as would enable students to obtain a precise and systematic acquaintance with it in a moderate space of time, and without a degree of labour disproportionate to its importance in relation to other branches of the law. No such work, so far as I know, exists; for all the existing books on the Law of Evidence are written on the usual model of English law-books, which, as a general rule, aim at being collections more or less complete of all the authorities upon a given subject to which a judge would listen in an argument in court. Such works often become, under the hands of successive editors, the repositories of an extraordinary amount of research, but they seem to me to have the effect of making the attainment by direct study of a real knowledge of the law, or of any branch of it as a whole, almost impossible. The enormous mass of detail and illustration which they contain, and the habit into which their writers naturally fall, of introducing into them everything which has any sort of connection, however remote, with the main subject, make these books useless for purposes of study, though they may increase their utility as works of reference. The enormous size and length of the standard works of reference are a proof of this. They consist of thousands of pages and refer to many thousand cases. When we remember that the Law of Evidence forms only one branch of the

Law of Procedure, and that the Substantive Law which regulates rights and duties ought to be treated independently of it, it becomes obvious that if a lawyer is to have anything better than a familiarity with indexes, he must gain his knowledge in some other way than from existing books. No doubt such knowledge is to be gained. Experience gives by degrees, in favourable cases, a comprehensive acquaintance with the principles of the law with which a practitioner is conversant. He gets to see that it is shorter and simpler than it looks, and to understand that the innumerable cases which at first sight appear to constitute the law, are really no more than illustrations of a comparatively small number of principles; but those who have gained knowledge of this kind have usually no opportunity to impart it to others. Moreover, they acquire it very slowly, and with needless labour themselves, and though knowledge so acquired is often specially vivid and well remembered, it is often fragmentary, and the possession of it not unfrequently renders those who have it sceptical as to the possibility, and even as to the expediency, of producing anything more systematic and complete.

The circumstances already mentioned led me to put into a systematic form such knowledge of the subject as I had acquired. This work is the result. The labour bestowed upon it has, I may say, been in an inverse ratio to its size.

My object in it has been to separate the subject of evidence from other branches of the law with which it has commonly been mixed up; to reduce it into a compact systematic form, distributed according to the natural division of the subject-matter; and to compress into precise definite rules, illustrated by examples, such cases and

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statutes as properly relate to the subject-matter so limited and arranged. I have attempted, in short, to make a digest of the law, which, if it were thought desirable, might be used in the preparation of a code, and which will, I hope, be useful, not only to professional students, but to every one who takes an intelligent interest in a part of the law of his country bearing directly on every kind of investigation into question of fact, as well as on every branch of litigation.

The Law of Evidence is composed of two elements; namely, first, an enormous number of cases, almost all of which have been decided in the course of the last 100 or 150 years, and which have already been collected and classified in various ways by a succession of text-writers, from Gilbert and Peake to Taylor and Roscoe; secondly, a comparatively small number of Acts of Parliament which have been passed in the course of the last thirty or forty years, and have effected a highly beneficial revolution in the law as it was when it attracted the denunciations of Bentham. Writers on the Law of Evidence usually refer to statutes by the hundred, but the Acts of Parliament which really relate to the subject are but few. A detailed account of this matter will be found at the end of the volume, in Note XXV.

The arrangement of this book is the same as that of the Indian Evidence Act, and is based upon the distinction between relevancy and proof, that is, between the question, What facts may be proved? and the question, How must a fact be proved assuming that proof of it may be given? The neglect of this distinction, which is concealed by the ambiguity of the word "evidence" (a word which sometimes means testimony and at other times relevancy), has thrown the whole subject into confusion, and

has made what is really plain enough appear almost incomprehensible.

In my *Introduction to the Indian Evidence Act*, published in 1872, and in speeches made in the Indian Legislative Council, I enter fully upon this matter. It will be sufficient here to notice shortly the principle on which the arrangement of the subject is based, and the manner in which the book has been arranged in consequence.

The great bulk of the Law of Evidence consists of negative rules declaring what, as the expression runs, is not evidence.

The doctrine that all the facts in issue and relevant to the issue, and no others, may be proved, is the unexpressed principle which forms the centre of and gives unity to all these express negative rules. To me these rules always appeared to form a hopeless mass of confusion, which might be remembered by a great effort, but could not be understood as a whole, or reduced to a system, until it occurred to me to ask the question, What is this evidence which you tell me hearsay is not? The expression "hearsay is not evidence" seemed to assume that I knew by the light of nature what evidence was, but I perceived at last that that was just what I did not know. I found that I was in the position of a person who, having never seen a cat, is instructed about them in this fashion: "Lions are not cats, nor are tigers nor leopards, though you might be inclined to think they were". Show me a cat to begin with, and I at once understand both what is meant by saying that a lion is not a cat, and why it is possible to call him one. Tell me what evidence is, and I shall be able to understand why you say that this and that class of facts are not evidence. The question, What is evidence? gradually disclosed the ambiguity of the word. To describe a matter of fact as "evidence" in the sense of

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testimony is obviously nonsense. No one wants to be told that hearsay, whatever else it is, is not testimony. What, then, does the phrase mean? The only possible answer is: It means that the one fact either is or else is not considered by the person using the expression to furnish a premiss or part of a premiss from which the existence of the other is a necessary or probable inference—in other words, that the one fact is or is not relevant to the other. When the inquiry is pushed further, and the nature of relevancy has to be considered in itself, and apart from legal rules about it, we are led to inductive logic, which shows that the judicial evidence is only one case of the general problem of science—namely, inferring the unknown from the known. As far as the logical theory of the matter is concerned, this is an ultimate answer. The logical theory was cleared up by Mr. Mill.<sup>1</sup> Bentham and some other<sup>2</sup> writers had more or less discussed the connection of logic with the rules of evidence. But I am not aware that it occurred to any one before I published my *Introduction to the Indian Evidence Act* to point out in detail the very close resemblance which exists between Mr. Mill's theory and the existing state of the law.

<sup>1</sup> [This opinion of the author's may perhaps be felt at the present day to call for some qualification. At the time these words were written Mill enjoyed a practically unchallenged supremacy in England as a master of logical theory. With the passing of time his reputation has greatly declined. Some discussion of this matter will be found in the Appendix (*post*, pp. 231-240, and especially pp. 231 and 234-235). The editors venture to think that the author has done himself something less than justice in saying that he founded himself on Mill's *Logic*, and that the real connection between him and the author is that the *Logic* acted as stimulus to the author which led him to an original formulation of a principle of the law of evidence which he expressed in terms that remain as sound to-day as when they were first put forward.]

<sup>2</sup> See, e.g., that able and interesting book, *An Essay on Circumstantial Evidence*, by the late Mr. Wills, father of Mr. Justice Wills. Chief Baron Gilbert's work on the Law of Evidence is founded on Loeke's *Essay* much as my work is founded on Mill's *Logic*.

The law has been worked out by degrees by many generations of judges who perceived more or less distinctly the principle on which it ought to be founded. The rules established by them no doubt treat as relevant some facts which cannot perhaps be said to be so. More frequently they treat as irrelevant facts which are really relevant, but, exceptions excepted, all their rules are reducible to the principle that facts in issue or relevant to the issue, and no others, may be proved.

The following outline of the contents of this work will show how in arranging it I have applied this principle.

All law may be divided into Substantive Law, by which rights, duties, and liabilities are defined, and the Law of Procedure, by which the Substantive Law is applied to particular cases.

The Law of Evidence is that part of the Law of Procedure which, with a view to ascertain individual rights and liabilities in particular cases, decides:

- I. What facts may, and what may not, be proved in such cases;
- II. What sort of evidence must be given of a fact which may be proved;
- III. By whom and in what manner the evidence must be produced by which any fact is to be proved.

I. The facts which may be proved are facts in issue, or facts relevant to the issue.

Facts in issue are those facts upon the existence of which the right or liability to be ascertained in the proceeding depends.

Facts relevant to the issue are facts from the existence of which inferences as to the existence of the facts in issue may be drawn.

A fact is relevant to another fact when the existence of

the one can be shown to be the cause or one of the causes, or the effect or one of the effects, of the existence of the other, or when the existence of the one, either alone or together with other facts, renders the existence of the other highly probable, or improbable, according to the common course of events.

Four classes of facts, which in common life would usually be regarded as falling within this definition of relevance, are excluded from it by the Law of Evidence except in certain cases:

1. Facts similar to, but not specially connected with, each other. (*Res inter alios actae.*)
2. The fact that a person not called as a witness has asserted the existence of any fact. (*Hearsay.*)
3. The fact that any person is of opinion that a fact exists. (*Opinion.*)
4. The fact that any person's character is such as to render conduct imputed to him probable or improbable. (*Character.*)

To each of those four exclusive rules there are, however, important exceptions, which are defined by the Law of Evidence.

II. As to the manner in which a fact in issue or relevant fact must be proved.

Some facts need not be proved at all, because the Court will take judicial notice of them, if they are relevant to the issue.

Every fact which requires proof must be proved either by oral or by documentary evidence.

Every fact, except (speaking generally) the contents of a document, must be proved by oral evidence. Oral evidence must in every case be direct, that is to say, it must consist of an assertion by the person who gives it that he

directly perceived the fact to the existence of which he testifies.

Documentary evidence is either primary or secondary. Primary evidence is the document itself produced in court for inspection.

Secondary evidence varies according to the nature of the document. In the case of private documents a copy of the document, or an oral account of its contents, is secondary evidence. In the case of some public documents, examined or certified copies, or exemplifications, must or may be produced in the absence of the documents themselves.

Whenever any public or private transaction has been reduced to a documentary form, the document in which it is recorded becomes exclusive evidence of that transaction, and its contents cannot, except in certain cases expressly defined, be varied by oral evidence, though secondary evidence may be given of the contents of the document.

III. As to the person by whom, and the manner in which the proof of a particular fact must be made.

When a fact is to be proved, evidence must be given of it by the person upon whom the burden of proving it is imposed, either by the nature of the issue or by any legal presumption, unless the fact is one which the party is estopped from proving by his own representations, or by his conduct, or by his relation to the opposite party.

The witnesses by whom a fact is to be proved must be competent. With very few exceptions, every one is now a competent witness in all cases. Competent witnesses, however, are not in all cases compelled or even permitted to testify.

The evidence must be given upon oath, or in certain

excepted cases without oath. The witnesses must be first examined in chief, then cross-examined, and then re-examined. Their credit may be tested in certain ways, and the answers which they give to questions affecting their credit may be contradicted in certain cases and not in others.

This brief statement will show what I regard as constituting the Law of Evidence properly so called. My view of it excludes many things which are often regarded as forming part of it. The principal subjects thus omitted are as follows:—

I regard the question, What may be proved under particular issues? (which many writers treat as part of the Law of Evidence) as belonging partly to the subject of pleading, and partly to each of the different branches into which the Substantive Law may be divided.

A is indicted for murder, and pleads Not Guilty. This plea puts in issue, amongst other things, the presence of any state of mind describable as malice aforethought, and all matters of justification or extenuation.

Starkie and Roscoe treat these subjects at full length, as supplying answers to the question, What can be proved under an issue of Not Guilty on an indictment for murder? Mr. Taylor does not go so far as this; but a great part of his book is based upon a similar principle of classification. Thus Chapters I. and II. of Part II. are rather a treatise on pleading than a treatise on evidence.

Again, I have dealt very shortly with the whole subject of presumptions. My reason is that they also appear to me to belong to different branches of the Substantive Law, and to be unintelligible, except in connection with them. Take, for instance, the presumption that every one knows the law. The real meaning of this is that, speaking

generally, ignorance of the law is not taken as an excuse for breaking it. This rule cannot be properly appreciated if it is treated as a part of the Law of Evidence. It belongs to the Criminal Law. In the same way numerous presumptions as to rights of property (in particular, easements and incorporeal hereditaments) belong not to the Law of Evidence but to the Law of Real Property. The only presumptions which, in my opinion, ought to find a place in the Law of Evidence, are those which relate to facts merely as facts, and apart from the particular rights which they constitute. Thus the rule, that a man not heard of for seven years is presumed to be dead, might be equally applicable to a dispute as to the validity of the marriage, an action of ejectment by a reversioner against a tenant *pur autre vie*, the admissibility of a declaration against interest, and many other subjects. After careful consideration, I have put a few presumptions of this kind into a chapter on the subject, and have passed over the rest as belonging to different branches of the Substantive Law.

Practice, again, appears to me to differ in kind from the Law of Evidence. The rules which point out the manner in which the attendance of witnesses is to be procured, evidence is to be taken on commission, depositions are to be authenticated and forwarded to the proper officers, interrogatories are to be administered, etc., have little to do with the general principles which regulate the relevancy and proof of matters of fact. Their proper place would be found in codes of civil and criminal procedure. I have, however, noticed a few of the most important of these matters.

A similar remark applies to a great mass of provisions as to the proof of certain particulars. Under the head of

"Public Documents", Mr. Taylor gives amongst other things a list of all, or most, of the statutory provisions which render certificates or certified copies admissible in particular cases.

To take an illustration at random, section 1458 (6th ed., 1872) begins thus: "The registration of medical practitioners under the Medical Act of 1858, may be proved by a copy of the *Medical Register*, for the time being, purporting," etc. I do not wish for a moment to undervalue the practical utility of such information, or the industry displayed in collecting it; but such provision as this appears to me to belong, not to the Law of Evidence, but to the law relating to medical men. It is a matter rather for an index or schedule than for a legal treatise, intended to be studied, understood, and borne in mind in practice.

On several other points the distinction between the Law of Evidence and other branches of the law is more difficult to trace. For instance, the law of estoppel, and the law relating to the interpretation of written instruments, both run into the Law of Evidence. I have tried to draw the line in the case of estoppels by dealing with estoppels *in pais* only, to the exclusion of estoppels by deed and by matter of record, which must be pleaded as such; and in regard to the law of written instruments, by stating those rules only which seemed to me to bear directly on the question whether a document can be supplemented or explained by oral evidence.

The result is no doubt to make the statement of the law much shorter than is usual. I hope, however, that competent judges will find that, as far as it goes, the statement is both full and correct. As to brevity, I may say, in the words of Lord Mansfield: "The law does not consist of

particular cases, but of general principles which are illustrated and explained in those cases".<sup>1</sup>

Every one will express somewhat differently the principles which he draws from a number of illustrations, and this is one source of that quality of our law which those who dislike it describe as vagueness and uncertainty, and those who like it as elasticity. I dislike the quality in question, and I used to think that it would be an improvement if the law were once for all enacted in a distinct form by the Legislature, and were definitely altered from time to time as occasion required. For many years I did my utmost to get others to take the same view of the subject, but I am now convinced by experience that the unwillingness of the Legislature to undertake such an operation proceeds from a want of confidence in its power to deal with such subjects, which is neither unnatural nor unfounded. It would be as impossible to get in Parliament a really satisfactory discussion of a Bill codifying the Law of Evidence as to get a committee of the whole House to paint a picture. It would, I am equally well satisfied, be quite as difficult at present to get Parliament to delegate its powers to persons capable of exercising them properly. In the meanwhile the Courts can decide only upon cases as they actually occur, and generations may pass before a doubt is set at rest by a judicial decision expressly in point. Hence, if anything considerable is to be done towards the reduction of the law to a system, it must, at present at least, be done by private writers.

Legislation proper is, under favourable conditions, the best way of making the law; but if that is not to be had, indirect legislation, the influence on the law of judges and legal writers, who deduce, from a mass of precedents, such

•      <sup>1</sup> *R. v. Bembridge*, 1783, 3 Doug. 327 at p. 332.

principles and rules as appear to them to be suggested by the great bulk of the authorities, and to be in themselves rational and convenient, is very much better than none at all. It has, indeed, special advantages, which this is not<sup>c</sup> the place to insist upon. I do not think the law can be in a less creditable condition than that of an enormous mass of isolated decisions, and statutes assuming unstated principles; cases and statutes alike being accessible only by elaborate indexes. I insist upon this because I am well aware of the prejudice which exists against all attempts to state the law simply, and of the rooted belief which exists in the minds of many lawyers that all general propositions of law must be misleading and delusive, and that law books are useless except as indexes. An ancient maxim says, "*Omnis definitio in jure periculosa*". Lord Coke wrote, "It is ever good to rely upon the books at large; for many times *compendia sunt dispendia*, and *Melius est petere fontes quam sectari rivulos*". Mr. Smith chose this expression as the motto of his *Leading Cases*, and the sentiment which it embodies has exercised immense influence over our law. It has not perhaps been sufficiently observed that when Coke wrote, the "books at large", namely the "Year Books" and a very few more modern reports, contained probably about as much matter as two, or at most three, years of the reports published by the Council of Law Reporting; and that the *compendia* (such books, say, as Fitzherbert's *Abridgment*) were merely abridgments of the cases in the "Year Books" classified in the roughest possible manner, and much inferior both in extent and arrangement to such a book as Fisher's *Digest*.<sup>1</sup>

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<sup>1</sup> The "Year Books" from 1307-1535, 228<sup>o</sup> years, would fill not more than twenty-five volumes of the "Law Reports".

In our own days it appears to me that the true *fontes* are not to be found in reported cases, but in the rules and principles which such cases imply, and that the cases themselves are the *rivuli*, the following of which is a *dispendium*. My attempt in this work has been emphatically *petere fontes*, to reduce an important branch of the law to the form of a connected system of intelligible rules and principles.

Should the undertaking be favourably received by the profession and the public, I hope to apply the same process to some other branches of the law; for the more I study and practise it, the more firmly am I convinced of the excellence of its substance and the defects of its form. Our earlier writers, from Coke to Blackstone, fell into the error of asserting the excellence of its substance in an exaggerated strain, whilst they showed much insensibility to defects, both of substance and form, which in their time were grievous and glaring. Bentham seems to me in many points to have fallen into the converse error. He was too keen and bitter a critic to recognise the substantial merits of the system which he attacked; and it is obvious to me that he had not that mastery of the law itself which is unattainable by mere theoretical study, even if the student is, as Bentham certainly was, a man of talents approaching closely to genius.

During the last generation or more Bentham's influence has to some extent declined, partly because some of his books are like exploded shells, buried under the ruins which they have made, and partly because, under the influence of some of the most distinguished of living authors, great attention has been directed to legal history, and in particular to the study of Roman Law. It would be difficult to exaggerate the value of these studies, but their

- nature and use are liable to be misunderstood. This history of the Roman Law no doubt throws great light on the history of our own; and the comparison of the two great bodies of law, under one or the other of which the laws of the civilised world may be classified, cannot fail to be instructive; but the history of bygone institutions is valuable mainly because it enables us to understand, and so to improve, existing institutions. It would be a complete mistake to suppose either that the Roman Law is in substance wiser than our own, or that in point of arrangement and method the Institutes and the Digest are anything but warnings. The pseudo-philosophy of the Institutes, and the confusion of the Digest, are, to my mind, infinitely more objectionable than the absence of arrangement and of all general theories, good or bad, which distinguish the Law of England.

However this may be, I trust the present work will show that the Law of England on the subject to which it refers is full of sagacity and practical experience, and is capable of being thrown into a form at once plain, short, and systematic.

I wish, in conclusion, to direct attention to the manner in which I have dealt with such parts of the Statute Law as are embodied in this work. I have given, not the very words of the enactments referred to, but what I understand to be their effect, though in doing so I have deviated as little as possible from the actual words employed. I have done this in order to make it easier to study the subject as a whole. Every Act of Parliament which relates to the Law of Evidence assumes the existence of the unwritten law. It cannot, therefore, be fully understood, nor can its relation to other parts of the law be appreci-

ated, till the unwritten law has been written down so that the provision of particular statutes may take their places as parts of it. When this is done, the Statute Law itself admits of, and even requires, very great abridgment. In many cases the result of a number of separate enactments may be stated in a line or two. For instance, the old Common Law as to the incompetency of certain classes of witnesses was removed by parts of six different Acts of Parliament—the net result of which is given in four short Articles (115-118).

So, too, the doctrine of incompetency for peculiar or defective religious belief has been removed by many different enactments, the effect of which is shown in one Article (133).

The various enactments relating to documentary evidence (see Chapter X.) appear to me to become easy to follow and to appreciate when they are put in their proper places in a general scheme of the law, and arranged according to their subject-matter. By rejecting every part of an Act of Parliament except the actual operative words which constitute its addition to the law, and by setting it (so to speak) in a definite statement of the unwritten law of which it assumes the existence, it is possible to combine brevity with substantial accuracy and fullness of statement to an extent which would surprise those who are acquainted with Acts of Parliament only as they stand in the Statute Book.<sup>1</sup> At the same time, I should warn any one who may use this book for the purposes of actual practice in or out of court, that he would do well to refer to the very words of the statutes embodied in it. It is very possible that, in stating their effect instead of their actual

<sup>1</sup> For a reference to statutes dealing strictly with evidence see Note XXV., *post*.

words, I may have given in some particulars a mistaken view of their meaning.

Such are the means by which I have endeavoured to make a statement of the Law of Evidence which will enable not only students of law but, I hope, any intelligent person who cares enough about the subject to study attentively what I have written, to obtain from it a knowledge of that subject at once comprehensive and exact—a knowledge which would enable him to follow in an intelligent manner the proceedings of Courts of Justice, and which would enable him to study cases and use text-books of the common kind with readiness and ease. I do not say more than this. I have not attempted to follow the matter out into its minute ramifications, and I have avoided reference to what after all are little more than matters of curiosity. I think, however, that any one who makes himself thoroughly acquainted with the contents of this book will know fully and accurately all the leading principles and rules of evidence which occur in actual practice.

If I am entitled to generalise at all from my own experience, I think that even those who are already well acquainted with the subject will find that they understand the relations of its different parts, and therefore the parts themselves, more completely than they otherwise would, by being enabled to take them in at one view, and to consider them in their relation to each other.

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### PART I RELEVANCY

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<sup>2</sup> For the list of Acts which apply the mode of proof prescribed by this Statute to various Public Departments, see Article 87, pp. 101-102.

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A. & E. . . . .	Adolphus & Ellis's Reports.
Archbold . . . . .	Archbold's Pleading, Evidence and Practice in Criminal Cases, 29th ed., 1934
Atk. . . . .	Atkyns's Reports.
B. & A. or Ald. . . . .	Barnewall and Alderson's Reports.
B. & Ad. . . . .	Barnewall and Adolphus's Reports.
B. & B. . . . .	Broderip & Bingham's Reports.
B. & C. . . . .	Barnewall and Cresswell's Reports.
B. & P. . . . .	Bosanquet and Puller's Reports.
B. & S. . . . .	Best and Smith's Reports.
B. N. P. . . . .	Buller's <i>Nisi Prius</i> .
Beav. . . . .	Beavan's Reports.
Bell, C. C. . . . .	Bell's Crown Cases.
Best . . . . .	Best on Evidence, 12th ed.
Bing. . . . .	Bingham's Reports.
Bing. N. C. . . . .	Bingham's New Cases.
Bligh . . . . .	Bligh's Reports, House of Lords.
Br. P. C. . . . .	Brown's Parliamentary Cases.
Buller, N. P. . . . .	Buller's <i>Nisi Prius</i> .
C. & F. . . . .	Clark & Finnelly's Reports.
C. & J. . . . .	Crompton & Jervis's Reports.
C. & Marsh. . . . .	Carrington & Marshman's Reports.
C. & P. . . . .	Carrington & Payne's Reports.
C. B. . . . .	Common Bench Reports.
C. B. (N. S.) . . . . .	Common Bench Reports. New Series.
C. M. & R. . . . .	Crompton, Meson, & Roscoe's Reports.
Camp. . . . .	Campbell's Reports.
Car. & Kir. . . . .	Carrington and Kirwan's Reports.
Coke . . . . .	Coke's Reports.
Cowp. . . . .	Cowper's Reports.
Cox . . . . .	Cox's Reports, Chancery.
Cox, C. C. . . . .	Cox's Criminal Cases.
Cr. App. Rep. . . . .	Cohen's Criminal Appeal Reports.
Cromp. & M . . . . .	Crompton & Meeson's Reports, Exchequer.
D. (or Dears.) & B. . . . .	Dearsly & Bell's Crown Cases.
Dears., or . . . . .	Dearsly's Crown Cases.
Dearly . . . . .	
De G. & J. . . . .	De Gex & Jones's Reports.
De G. & M. & G. . . . .	De Gex, Maenaghten, & Gordon's Bankruptcy Cases.

## LIST OF ABBREVIATIONS

De G. & S.	.	De Gex & Smale's Reports.
Den. C. C.	.	Denison's Crown Cases.
Doug.	.	Douglas's Reports.
Dow & Cl.	.	Dow & Clark's House of Lords Cases.
Dru. & War.	.	Drury & Warren's Reports.
E. & B.	.	Ellis & Blackburn's Reports.
Ea.	.	East's Reports.
East, P. C.	.	East's Pleas of the Crown.
Esp.	.	Espinasse's Reports.
Ex.	.	Exchequer Reports.
F. & F.	.	Foster & Finlason's Reports.
Gen. View Crim Law		Stephen's General View of the Criminal Law.
Godbolt	.	Godbolt's Reports, K.B.
H. & C.	.	Hurlstone & Coltman's Reports.
H. & N.	.	Hurlstone & Norman's Reports.
H. L. C.	.	House of Lords Cases.
Hale, P. C.	.	Hale's Pleas of the Crown.
Halsbury, xiii	.	Halsbury's Laws of England, 2nd ed. 1934, vol. xiii., Tit. Evidence.
Hare	.	Hare's Reports.
H. Bl.	.	H. Blackstone's Reports.
Ir. Cir. Rep.	.	Irish Circuit Reports.
Ir. Eq. Rep.	.	Irish Equity Reports.
Jac. & Wal.	.	Jacob & Walker's Reports.
Jebb, C. C.	.	Jebb's Crown Cases (Ireland).
K. & J.	.	Kay & Johnson's Reports.
Keen	.	Keen's Reports, Chancery.
L. & C.	.	Leigh & Cave's Crown Cases.
L. J.	.	Law Journal Reports.
L. T.	.	Law Times Reports.
Leach C. C.	.	Leach's Crown Cases.
M. & G.	.	Manning & Granger's Reports.
M. & K.	.	Mylne & Keen's Reports.
M. & M.	.	Moody & Malkin's Reports.
M. & R.	.	Moody & Ryan's Reports.
M. & S.	.	Mauls and Selwyn's Reports.
M. & W.	.	Meeson & Welsby's Reports.
Madd.	.	Maddock's Reports.
Man. & Ry.	.	Manning & Ryland's Reports.
McNally Ev.	.	McNally's Rules of Evidence.
Moo. C. C.	.	Moody's Crown Cases.
Moo. P. C.	.	Moore's Privy Council Reports.
Mo. & Ro.	.	Moody & Robinson's Reports.

## LIST OF ABBREVIATIONS

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P. or P.D.	.	.	Law Reports, Probate, Divorce and Admiralty Division.
Pea. R.	.	.	Peake's Reports.
Phill.	.	.	Phillip's Reports.
Phipson	.	.	Phipson's Law of Evidence, 7th ed.
Price	.	.	Price's Reports.
Q.B.	.	.	Queen's Bench Reports.
R.S.C.	.	.	Rules of the Supreme Court, 1883.
R. & R.	.	.	Russell & Ryan's Crown Cases.
Rep.	.	.	Coke's Reports.
Roscoe's Cr. Ev.	.	.	Roscoe's Criminal Evidence, 15th ed.
Roscoe	.	.	Roscoe's Evidence in Civil Actions, 20th ed. (formerly Roscoe's <i>Nisi Prius</i> ).
Russ. Cri.	.	.	Russell on Crimes, 8th ed.
Russ. & Myl.	.	.	Russell and Mylne's Reports, Chancery.
Ry. & Mo.	.	.	Ryland & Moody.
Selw. N. P.	.	.	Selwyn's <i>Nisi Prius</i> .
Simons	.	.	Simons' Reports.
Sim. (N. S.)	.	.	Simons' Reports. New Series.
Sim. & Stu.	.	.	Simons & Stuart's Reports.
S. L. C., or	.	.	Smith's Leading Cases, 13th ed.
Smith, L. C.	.	.	
Star. R.	.	.	Starkie's Reports.
Starkie, or	.	.	Starkie on Evidence, 4th ed.
Star. Ev.	.	.	
S. T., or St. Tri.	.	.	State Trials.
Story's Eq. Jur.	.	.	Story's Equity Jurisprudence.
Swab. Ad.	.	.	Swabey's Admiralty Reports.
Sw. & Tr., or	.	.	Swabey & Tristram's Reports, Probate and Divorce.
Swa. & Tri., or	.	.	
S. & T.	.	.	
T. L. R.	.	.	The Times Law Reports.
T. R.	.	.	Term Reports.
T. E.	.	.	Taylor on Evidence, 12th ed.
Tau.	.	.	Taunton's Reports.
Ve.	.	.	Vesey's Reports.
Vin. Abr.	.	.	Viner's Abridgement.
Wigram	.	.	Wigram on Extrinsic Evidence.
Wills	.	.	Theory and Practice of the Law of Evidence, by Wm. Wills, 2nd ed.
Wills' Circ. Ev.	.	.	Wills on Circumstantial Evidence.
Wils., or.	.	.	Wilson's Reports.
Wilson	.	.	

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PART I  
RELEVANCY



## CHAPTER I

### *PRELIMINARY*

#### ARTICLE I

##### DEFINITION OF TERMS

IN this book the following words and expressions are used in the following senses, unless a different intention appears from the context:

“Judge” includes all persons authorised to take evidence, either by law or by the consent of the parties.

“Fact” includes the fact that any mental condition of which any person is conscious exists.

“Document” means any substance having any matter expressed or described upon it by marks capable of being read.

“Evidence” means—

(1) Statements made by witnesses in court under a legal sanction, in relation to matters of fact under inquiry;

such statements are called oral evidence;

(2) Documents produced for the inspection of the Court or judge;

such documents are called documentary evidence.

“Conclusive proof” means evidence upon the production of which, or a fact upon the proof of which, the judge is bound by law to regard some fact as proved, and to exclude evidence intended to disprove it.

“A presumption” means a rule of law that Courts and

judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved.

The expression "fact in issue" means any one of the body of facts from which when their existence has been proved in a judicial proceeding a legal liability or non-liability of defined extent would follow; provided that—

no fact is in issue unless it has been either expressly affirmed and denied by the respective pleadings of the parties, or

is deemed by the operation of any rule of procedure to have been affirmed by one party and denied by the other.<sup>1</sup>

The word "relevant" means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other.<sup>2</sup>

#### *Illustrations*

(a) In criminal cases the plea of Not Guilty puts in issue all the material facts of the prosecution's case.

(b) By R.S.C. O. xxi, r. 4, no denial or defence is necessary as to damages claimed, or their amount: but they shall be

<sup>1</sup> Hitherto it has been usual to define facts in issue by a reference in the first place to the pleadings. This was a natural course to pursue when pleadings could be conveniently regarded as an adaptation of the old system of oral pleadings *in court* in which the parties eventually arrived at a contradiction of fact called an issue. But modern pleadings have departed so far from this model that to-day it seems convenient to regard the contents of the pleadings as a restriction on the logical rule which decides what facts are in issue.

<sup>2</sup> This definition does not confine relevance to *facta probantia* (see p. 6, n.), which is a way of using the word. As to relevance generally see Taylor, pt. ii, ch. ii; Phipson, 40-43; Halsbury, xiii, pp. 550-554.

deemed to be put in issue in all cases unless expressly admitted.

(c) By R.S.C. O. xxvii, r. 13, all material statements of fact contained in the pleading delivered next before close of pleadings shall be deemed to have been denied and put in issue.

## CHAPTER II

### OF FACTS IN ISSUE AND RELEVANT<sup>1</sup> TO THE ISSUE

#### ARTICLE 2

##### FACTS IN ISSUE AND RELEVANT TO THE ISSUE MAY BE PROVED<sup>2</sup>

EVIDENCE may be given in any proceeding of any fact in issue,<sup>3</sup>

and of any fact relevant to any fact in issue unless it is hereinafter declared to be deemed to be irrelevant,<sup>4</sup>  
and of any fact hereinafter declared to be deemed relevant to the issue:

Provided that the judge may exclude evidence of facts, which, though relevant or deemed to be relevant to the issue, appear to him too remote to be material under all the circumstances of the case.<sup>4</sup>

#### *Illustration*

A is indicted for the murder of B, and pleads not guilty. The following facts may be in issue: The fact that A killed

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<sup>1</sup> See Appendix for a discussion of the logical meaning of this word.

<sup>2</sup> See Appendix, pp. 238-240.

<sup>3</sup> The distinction between "facts in issue", and "facts relevant to the issue", is sometimes expressed by calling the former "*facta probanda*" and the latter "*facta probantia*".

<sup>4</sup> In civil cases the judge has no power to call a witness against the will of the parties. *In re Enoch & Zartsky, Bock & Co.*, [1910] 1 K.B. 327 (C.A.). In criminal cases, however, the rule is different. *R. v. Harris*, [1927] 2 K.B. 587.

B; the fact that at the time when A killed B he was prevented by disease from knowing right from wrong; the fact that A had received from B such provocation as would reduce A's offence to manslaughter.

The fact that A was at a distant place at the time of the murder would be relevant to the issue; the fact that A had a good character would be deemed to be relevant; the fact that C on his deathbed declared that C and not A murdered B would be deemed not to be relevant.

### ARTICLE 3

#### RELEVANCY OF FACTS FORMING PART OF THE SAME TRANSACTION AS THE FACTS IN ISSUE

A transaction is a group of facts so connected together as to be referred to by a single legal name, as a crime, a contract, a wrong, or any other subject of inquiry which may be in issue.

Every fact which is part of the same transaction as the facts in issue is deemed to be relevant to the facts in issue, although it may not be actually in issue, and although if it were not part of the same transaction it might be excluded as hearsay.

Whether any particular fact is or is not part of the same transaction as the facts in issue is a question of law upon which no principle has been stated by authority, and on which single judges have given different decisions.

When a question as to the ownership of land depends on the application to it of a particular presumption capable of being rebutted, the fact that it does not apply to other neighbouring pieces of land similarly situated is deemed to be relevant.

#### *Illustrations*

(a) The question was, whether A murdered B by shooting him.

The fact that a witness in the room with B when he was shot, saw a man with a gun in his hand pass a window opening into the room in which B was shot, and thereupon exclaimed, "There's butcher!" (a name by which A was known), was allowed to be proved by Lord Campbell, L.C.J.<sup>1</sup>

(b) The question was, whether A cut B's throat, or whether B cut it herself.

A statement made by B when running out of the room in which her throat was cut immediately after it had been cut was not allowed to be proved by Cockburn, L.C.J.<sup>2</sup>

(c) The question was, whether A was guilty of the manslaughter of B by carelessly driving over him.

<sup>1</sup> *R. v. Fowkes*, Leicester Spring Assizes, 1856. *Ex relatione* O'Brien, Serjt.

In the report of this case in *The Times* for March 8th, 1856, the evidence of the witnesscs on this point is thus given:

"*William Fowkes*: My father got up [? went to] the window, and opened it and shoved the shutter back. He waited there about three minutes. It was moonlight, the moon about the full. He closed the window, but not the shutter. My father was returning to the sofa when I heard a crash at the window. I turned to look, and hooted, 'There's butcher!' I saw his face at the window, but did not see him plain. He was standing still outside. I aren't able to tell who it was, not certainly. I could not tell his size. While I was hooting the gun went off, I hooted very loud. He was close to the shutter or thereabouts. It was only open about eight inches. *Lord Campbell*: Did you see the face of the man? *Witness*: Yes; it was moonlight at the time. I have a belief that it was the butcher. I believe it was... I now believe it from what I then saw. I heard the gun go off when he went away. We heard him run by the window through the garden towards the park."

Upon cross-examination the witness said that he saw the face when he hooted and heard the report at the same moment. The report adds, "The statement of this witness was confirmed by Cooper, the policeman (who was in the room at the time), except that Cooper saw nothing when William Fowkes hooted, 'There's butcher at the window!' He stated he had not time to look before the gun went off. In this case the evidence as to W. Fowkes's statement could not be admissible on the ground that what he said was in the prisoner's presence, as the window was shut when he spoke. It is also obvious that the fact that he said at the time "There's butcher!" was far more likely to impress the jury than the fact that he was at the trial uncertain whether the person he saw was the butcher, though he was disposed to think so.

<sup>2</sup> *R. v. Bedingfield*, Suffolk Assizes, 1879, 14 Cox, C.C. 341. The propriety of this decision was the subject of two pamphlets, one by W. Pitt Taylor, who denied, the other by the Lord Chief Justice, who maintained it.

A statement made by B as to the cause of his accident as soon as he was picked up was allowed to be proved by Park, J., Gurney, B., and Patteson, J., though it was not a dying declaration within Article 27.<sup>1</sup>

(d) The question was, whether C poisoned A. A and B were both poisoned by eating the same cake. B's dying declaration that she made the cake in C's presence, and put nothing bad in it, was admitted on the ground that the making and the poisoning of the cake formed one transaction.<sup>2</sup>

(e) A, a stock-jobber, sold stock to B, a stock-broker, on account of C, B's client. By the usage of the Stock Exchange B as broker was responsible to A for payment for the stock. The question was whether A could recover from C. Evidence of a request by A to B after the transfer to give him C's cheque was admitted as part of the same transaction as the sale.<sup>3</sup>

(f) The question is, whether A the owner of one side of a river owns the entire bed of it or only half the bed at a particular spot. The fact that he owns the entire bed a little lower down than the spot in question is deemed to be relevant.<sup>4</sup>

(g) The question is, whether a piece of land by the roadside belongs to the lord of the manor or to the owner of the adjacent land. The fact that the lord of the manor owned other parts of the slip of land by the side of the same road is deemed to be relevant.<sup>5</sup>

#### ARTICLE 4

##### ACTS OF CONSPIRATORS<sup>6</sup>

When two or more persons conspire together to commit any offence or actionable wrong, everything said, done,

<sup>1</sup> *R. v. Foster*, 1834, 6 C. & P. 325.

<sup>2</sup> *R. v. Baker*, 1837, 2 Mo. & Ro. 53. Cf. Article 27 (Dying Declaration).

<sup>3</sup> *Mortimer v. McCallan*, 1840, 6 M. & W. 58. Cf. Article 9, Ill. (c).

<sup>4</sup> *Jones v. Williams*, 1837, 2 M. & W. 326.

<sup>5</sup> *Doe v. Kemp*, 1831, 7 Bing. 332; 2 Bing. N.C. 102.

<sup>6</sup> The principle of this Article is substantially the same as that of principal and accessory, or principal and agent. When various persons conspire to commit an offence, each makes the rest his agents to carry the plan into execution. Cf. Article 18. See generally Taylor, ss. 591-95. Best, s. 508; Russ. Cr., 188 *et seq.*; Phipson, 88-89.

or written by any one of them in the execution or furtherance of their common purpose, is deemed to be so said, done, or written by every one, and is deemed to be a relevant fact as against each of them; but statements made by individual conspirators as to measures taken in the execution or furtherance of any such common purpose are not deemed to be relevant as such as against any conspirators, except those by whom or in whose presence such statements are made. Evidence of acts or statements deemed to be relevant under this article may not be given until the judge is satisfied that, apart from them, there are *prima facie* grounds for believing in the existence of the conspiracy to which they relate.

### *Illustrations*

(a) The question is, whether A and B conspired together to cause certain imported goods to be passed through the custom-house on payment of too small an amount of duty.

The fact that A made in a book a false entry, necessary to be made in that book in order to carry out the fraud, is deemed to be a relevant fact as against B.

The fact that A made an entry on the counterfoil of his cheque-book, showing that he had shared the proceeds of the fraud with B, is deemed not to be a relevant fact as against B.

(b) The question is, whether A committed high treason by imagining the king's death; the overt act charged is that he presided over an organised political agitation calculated to produce a rebellion, and directed by a central committee through local committees.

The facts that meetings were held, speeches delivered, and papers circulated in different parts of the country, in a manner likely to produce rebellion by and by the direction of persons shown to have acted in concert with A, are

<sup>1</sup> *R. v. Blake*, 1844, 6 Q.B. 126.

deemed to be relevant facts as against A, though he was not present at those transactions, and took no part in them personally.

An account given by one of the conspirators in a letter to a friend, of his own proceedings in the matter, not intended to further the common object, and not brought to A's notice, is deemed not to be relevant as against A.<sup>1</sup>

## ARTICLE 5

### TITLE<sup>2</sup>

When the existence of any right of property, or of any right over property is in question, every fact which constitutes the title of the person claiming the right, or which shows that he, or any person through whom he claims, was in possession of the property, and every fact which constitutes an exercise of the right,<sup>3</sup> or which shows that its exercise was disputed, or which is inconsistent with its existence or renders its existence improbable, is deemed to be relevant.

### *Illustrations*

(a) The question is, whether A has a right of fishery in a river.

An ancient *inquisitio post mortem* finding the existence of a right of fishery in A's ancestors, licences to fish granted by his ancestors, and the fact that the licensees fished under them, are deemed to be relevant.<sup>4</sup>

(b) The question is, whether A owns land.

<sup>1</sup> *R. v. Hardy*, 1794, 24 S.T. *passim*, but see particularly 451-453.

<sup>2</sup> The principle of this Article is fully explained and illustrated in *Malcolmson v. O'Dea*, 1862, 10 H.L.C. 593. See particularly the reply to questions put by the House of Lords to the Judges, delivered by Willes, J., pp. 611-622. Cf. Article 73 as to ancient deeds. See, too, Taylor, ss. 658-667; Best, s. 499; Phipson, 107-108; Halsbury, xiii, p. 557.

<sup>3</sup> Common practice; and see *Marshall v. Taylor*, [1895] 1 Ch. 641 (C.A.), and *Williams-Ellis v. Cobb*, [1935] 1 K.B. (C.A.) 310 at p. 318.

<sup>4</sup> *Rogers v. Allen*, 1808, 1 Camp. 309.

The fact that A's ancestors granted leases of it is deemed to be relevant.<sup>1</sup>

(c) The question is, whether there is a public right of way over A's land.

The facts that persons were in the habit of using the way, that they were turned back, that the road was stopped up, that the road was repaired at the public expense, and A's title-deeds showing that for a length of time, reaching beyond the time when the road was said to have been used, no one had power to dedicate it to the public, are not facts in issue but are all deemed to be relevant to the facts in issue.<sup>2</sup>

## ARTICLE 6

### CUSTOMS

When the existence of any custom is in question, every fact is deemed to be relevant which shows how, in particular instances, the custom was understood and acted upon by the parties then interested.

#### *Illustrations*

(a) The question is, whether, by the custom of borough-English as prevailing in the manor of C, A is heir to B.

The fact that other persons, being tenants of the manor, inherited from ancestors standing in the same or similar relations to them as that in which A stood to B, is deemed to be relevant.<sup>3</sup>

(b) The question was, whether by the custom of the country a tenant-farmer not prohibited by his lease from

<sup>1</sup> *Doe v. Pulman*, 1842, 3 Q.B. 622, 626 (citing *Duke of Bedford v. Lopes*). The document produced to show the lease was a counterpart signed by the lessee. See *post*, Article 67.

<sup>2</sup> See *Williams-Ellis v. Cobb*, [1935] 1 K.B. (C.A.) 310 at p. 318.

<sup>3</sup> *Muggleton v. Barnett*, 1856, 1 H. & N. 282; and see *Johnstone v. Lord Spencer*, 1885, 30 Ch.D. 581. It was held in this case that a custom might be shown by uniform practice which was not mentioned in any custumal Court roll or other record. For cases of evidence of a custom of trade, see *Ex parte Powell, in re Matthews*, 1875, 1 Ch.D. 501; and *Ex parte Turquand, in re Parker*, 1885, 14 Q.B.D. 636. See too the Notes on *Wigglesworth and Dallison*, in 1 Smith's Leading Cases, 597.

doing so might pick and sell surface flints, minerals being reserved by his lease. The fact that under similar provisions in leases of neighbouring farms flints were taken and sold is deemed to be relevant.<sup>1</sup>

(c) The question was, whether fishermen in a parish were entitled to spread out their nets on certain lands. The facts that during living memory, and by reputation before it, the fishermen had spread out nets on the land to dry them, that they had prepared them there at the beginning and the end of the season, and by a new practice had oiled and spread them out there at a different period were held to be relevant.<sup>2</sup>

### ARTICLE 7

#### MOTIVE, PREPARATION, SUBSEQUENT CONDUCT, EXPLANATORY STATEMENTS

When there is a question whether any act was done by any person, the following facts are deemed to be relevant, that is to say—

any fact which supplies a motive for such an act, or which constitutes preparation for it;<sup>3</sup>

any subsequent conduct of such person apparently influenced by the doing of the act, and any act done in consequence of it by or by the authority of that person.<sup>4</sup>

#### *Illustrations*

(a) The question is, whether A murdered B.

The facts that, at the instigation of A, B murdered C twenty-five years before B's murder, and that A at or before that time used expressions showing malice against C, are deemed to be relevant as showing a motive on A's part to murder B.<sup>5</sup>

<sup>1</sup> *Tucker v. Linger*, 1882, L.R. 21 Ch.D. 18; and see p. 37.

<sup>2</sup> *Mercer v. Denne*, [1905] 2 Ch. 538 (C.A.).

<sup>3</sup> Illustrations (a) and (b).

<sup>4</sup> Illustrations (c), (d), and (e).

<sup>5</sup> *R. v. Cleves*, 1830, 4 C. & P. 221; *R. v. Palmer*, 1856, *Gen. View*, 230, and in *Notable English Trials, Trial of Palmer* at pp. 50 and 52.

(b) The question is, whether A committed a crime.

The fact that A procured the instruments with which the crime was committed is deemed to be relevant.<sup>1</sup>

(c) A is accused of a crime.

The facts that, either before or at the time of, or after the alleged crime, A caused circumstances to exist tending to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed things or papers, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence, are deemed to be relevant.<sup>2</sup>

(d) The question is, whether A committed a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, and the manner in which he conducted himself when statements on the subject were made in his presence and hearing, are deemed to be relevant.<sup>3</sup>

(e) The question is, whether A suffered damage in a railway accident.

The fact that A conspired with B, C, and D to suborn false witnesses in support of his case is deemed to be relevant,<sup>4</sup> as conduct subsequent to a fact in issue tending to show that it had not happened.

## ARTICLE 8

### FACTS DEEMED TO BE RELEVANT IN GENERAL

The following facts are deemed to be relevant in so far as they are necessary respectively for the purposes mentioned, *i.e.* facts—

<sup>1</sup> *R. v. Palmer, supra.*

<sup>2</sup> *R. v. Patch, 1805, Wills, Circ. Ev. (5th ed. 1902), 390; R. v. Palmer, ubi supra (passim).*

<sup>3</sup> Common practice, and see *R. v. Palmer, ubi supra*.

<sup>4</sup> *Moriarty v. London, Chatham and Dover Ry. Co., 1870, L.R. 5 Q.B. 274; compare Gervy v. Redman, 1875, 1 O.B.D. 161.*

- ✓ necessary to be known to explain or introduce a fact in issue, or relevant or deemed to be relevant to the issue (Illustration (a)); or
- ✓ which support or rebut an inference suggested by any such fact (Illustrations (b), (c), (d)); or
- ✓ which establish the identity of any thing or person whose identity is in issue, or is, or is deemed to be, relevant to the issue; or
- ✓ which fix the time or place at which any such fact as above mentioned happened; or
- which show that any document produced is genuine or otherwise; or
- which show the relationship of the parties by whom any such fact as above-mentioned was transacted (Illustration (b)); or
- which afforded an opportunity for the occurrence of any such fact or of such transaction (Illustrations (e), (f)); or
- which are necessary to be known in order to show the relevance of other facts.

#### *Illustrations*

(a) The question is, whether a writing published by A of B is libellous or not.

The position and relations of the parties at the time when the libel was published may be deemed to be relevant facts as introductory to the facts in issue.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are not deemed to be relevant under this article, though the fact that there was a dispute may be deemed to be relevant if it affected the relations between A and B.<sup>1</sup>

(b) The question is, whether A wrote an anonymous letter

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<sup>1</sup> Common practice.

threatening<sup>1</sup> B, and requiring B to meet the writer at a certain time and place to satisfy his demands.

The fact that A met B at that time and place is deemed to be relevant, as conduct subsequent to and affected by a fact in issue.

The fact that A had a reason, unconnected with the letter, for being at that time at that place, is deemed to be relevant, as rebutting the inference suggested by his presence.<sup>2</sup>

(c) A is tried for a riot, and is proved to have marched at the head of a mob. The cries of the mob are deemed to be relevant, as explanatory of the nature of the transaction.<sup>3</sup>

(d) The question is, whether a deed was forged. It purports to be made in the reign of Philip and Mary, and enumerates King Philip's titles.

The fact that at the alleged date of the deed, Acts of State and other records were drawn with a different set of titles, is deemed to be relevant.<sup>4</sup>

(e) The question is, whether A poisoned B. Habits of B known to A, which would afford A an opportunity to administer the poison, are deemed to be relevant facts.<sup>5</sup>

(f) The question is, whether A made a will under undue influence. His way of life, and relations with the persons said to have influenced him unduly, are deemed to be relevant facts.<sup>6</sup>

## ARTICLE 9

### STATEMENTS EXPLAINING OR ACCOMPANYING ACTS.

### STATEMENTS MADE IN THE PRESENCE OF A PERSON

Statements explaining the nature of, or accompanying an act the doing of which is in issue, made by or to a person doing it, are deemed to be relevant.<sup>7</sup>

<sup>1</sup> *R. v. Barnard*, 1758, 19 St. Tri. 815, etc.

<sup>2</sup> *R. v. Lord George Gordon*, 1781, 21 St. Tri. 514, 515, 520, 529, 532, etc.

<sup>3</sup> *Lady Ivy's Case*, 1684, 10 St. Tri. 617, 618.

<sup>4</sup> *R. v. Donellan*, 1781, Wills, Circ. Ev. (5th ed. 1902), 380; and see my *Hist. Crim. Law*, iii. p. 371.

<sup>5</sup> *Boyse v. Rossborough*, 1857, 6 H.L.C. 42-58.

<sup>6</sup> Illustrations (a) and (b). Other statements made by such persons are relevant or not according to the rules as to statements hereinafter contained. See Chapter IV, *post*.

When a person's conduct is in issue or is deemed to be relevant to the issue, statements made in his presence and hearing by which his conduct is likely to have been affected are deemed to be relevant.<sup>1</sup>

### *Illustrations*

(a) The question is, whether A committed an act of bankruptcy, by departing the realm with intent to defraud his creditors.

Letters written by him during his absence from the realm indicating such an intention are deemed to be relevant facts.<sup>2</sup>

(b) The question is, whether A was sane.

The fact that he acted upon a letter received by him is part of the facts in issue. The contents of the letter so acted upon are deemed to be relevant, as statements accompanying and explaining such conduct.<sup>3</sup>

(c) The question was, whether a farm in possession of B was subject to a charge in favour of A.

A was in possession of the title-deeds of the farm, which had been handed over to C deceased, his predecessor in title, by way of equitable mortgage. A memorandum by C, made about eighteen months after the transaction it recorded, and setting out the terms of the arrangement under which the

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<sup>1</sup> See *R. v. Christie*, [1914] A.C. 545, where it was laid down by the House of Lords that "there is no rule of law that evidence of a statement made in the presence and hearing of the accused is not admissible as having a bearing on his conduct unless he accepts the statement", but that it should not be admitted. This rule seems a difficult one to apply in criminal cases at least. If a man is charged with commission of a crime, the fact that he denies it, the terms in which he denies it, and the fact that he does not deny it, all seem to be relevant to the question of his guilt. But the rule appears to be that if the accused does not accept the statement made in his presence "by word or conduct, action or demeanour", evidence thereof is not admissible. There would seem to be no difficulty in applying this to civil cases.

<sup>2</sup> *Rawson v. Haigh*, 1824, 2 Bing. 99; *Bateman v. Bailey*, 1794, 5 T.R. 512.

<sup>3</sup> *Wright v. Doe d. Tatham*, 1837, 7 A. & E. 313, at pp. 324-325 (per Denman, C.J.).

mortgage was created, was admitted as explaining the act in question.<sup>1</sup>

### ARTICLE 10 \*

#### CONDUCT AND COMPLAINTS IN CRIMINAL CASES

In criminal cases the conduct of a person against whom an offence is said to have been committed, and in particular the fact that soon after the offence he made a complaint to the persons to whom he would naturally complain are deemed to be relevant; but the terms of the complaint are irrelevant.

To this rule there are two exceptions, viz.:

(a) In a case of rape or other sexual offence against a woman or child, the terms of the complaint are deemed to be relevant, as showing that the conduct of such person was consistent with the story told by the woman or child.<sup>2</sup>

(b) In a case of indecent assault, an act of gross indecency, or sodomy committed with a male not of mature years, the terms of the complaint are deemed to be relevant as showing that the conduct of such person was consistent with the story told by him.<sup>3</sup>

\* See Note I.

<sup>1</sup> *Homes v. Newman*, [1931] 2 Ch. 112. The memorandum was also treated as a declaration by a deceased person against his pecuniary interest, see Article 29, p. 43. See too *Neil v. Duke of Devonshire*, 1882, 8 App. Ca. 135.

<sup>2</sup> *R. v. Osborne*, [1905] 1 K.B. 551, explaining *R. v. Lillyman*, [1896] 2 Q.B. 167. See Note I, p. 185.

<sup>3</sup> *R. v. Camelleri*, [1922] 2 K.B. 122, and *R. v. Wannell*, 1922, 17 Cr. App. Rep. 53.

## CHAPTER III

### *OCCURRENCES SIMILAR TO BUT UNCONNECTED WITH THE FACTS IN ISSUE, IRRELEVANT EXCEPT IN CERTAIN CASES*

#### ARTICLE II \*

##### SIMILAR BUT UNCONNECTED FACTS

A FACT which renders the existence or non-existence of any fact in issue probable by reason of its general resemblance thereto and not by reason of its being connected therewith in any of the ways specified in Articles 3-9, both inclusive, is deemed not to be relevant to such fact except in the cases specially excepted in this chapter.

##### *Illustrations*

(a) The question is, whether A committed a crime.

The fact that he formerly committed another crime of the same sort, and had a tendency to commit such crimes, is deemed to be irrelevant.

(b) The question is, whether A broke and entered a dwelling-house with intent to commit the felony of rape. The prosecution allege that acts of violence against the woman had taken place. The defence is that no such acts took place, and that A went to the house with the woman's consent, intending merely to "court" her.

Evidence tendered by the prosecution that just previously A entered a near-by dwelling-house and had connection with a woman with her consent is inadmissible.<sup>1</sup>

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\* See Note II.

<sup>1</sup> *R. v. Radley.* [1913] 3 K.B. 468.

(c) The question is, whether A, a brewer, sold good beer to B, a publican. The fact that A sold good beer to C, D, and E, other publicans, is deemed to be irrelevant<sup>1</sup> (unless it is shown that the beer sold to all is of the same brewing).

### ARTICLE 12<sup>2</sup>

#### ACTS SHOWING INTENTION, GOOD FAITH, ETC.

When there is a question whether a person said or did something, the fact that he said or did something of the same sort on a different occasion may be proved if it shows the existence on the occasion in question of any intention, knowledge, good or bad faith, malice, or other state of mind, or of any state of body or bodily feeling, the existence of which is in issue, or is or is deemed to be relevant to the issue; or if, on the trial of a criminal charge against such person, it tends to rebut a defence otherwise open to him; but such acts or words may not be proved merely in order to show that the person so acting or speaking was likely on the occasion in question to act in a similar manner.

Whenever any person is being proceeded against for receiving any property knowing it to have been stolen, or for having in his possession stolen property, for the purpose of proving guilty knowledge, the following facts are relevant:<sup>3</sup>

(a) The fact that other property stolen within the period of twelve months preceding the date of the offence charged was found or had been<sup>3</sup> in his possession;

(b) the fact that within the five years preceding the date of the offence charged he was convicted of any offence

\* See Note II.

<sup>1</sup> *Holcombe v. Hewson*, 1810, 2 Camp. 391.

<sup>2</sup> Larceny Act, 1916, s. 43 (1); see *R. v. Smith*, p. 24, *post*.

<sup>3</sup> As to the effect of the words 'had been' see p. 21, n. 1.

involving fraud or dishonesty: provided that this last-mentioned fact may not be proved unless (i) seven days' notice in writing has been given to the offender that proof of such previous conviction is intended to be given, and (ii) evidence has been given that the property in respect of which the offender is being tried was found or had been in his possession.<sup>1</sup>

### *Illustrations*

(a) A is charged with receiving two pieces of silk from B, knowing them to have been stolen by him from C.

The facts that A received from B many other articles stolen by him from C in the course of several months, and that A pledged all of them, are deemed to be relevant to the fact that A knew that the two pieces of silk were stolen by B from C.<sup>2</sup>

(b) A is charged with uttering, on December 12th, 1854, a counterfeit crown piece, knowing it to be counterfeit.

The facts that A uttered another counterfeit crown piece on December 11th, 1854, and a counterfeit shilling on January 4th, 1855, are deemed to be relevant to show A's knowledge that the crown piece uttered on the 12th was counterfeit.<sup>3</sup>

(c) A is charged with attempting to obtain money by false pretences, by trying to pledge to B a worthless ring as a diamond ring.

The facts that two days before, A tried, on two separate occasions, to obtain money from C and D respectively, by a similar assertion as to the same or a similar ring, and that on another occasion on the same day he obtained a sum of

<sup>1</sup> This section repeals and replaces 34 & 35 Vict. c. 112, s. 19, but alters the language. Under the older Act it was necessary that the property to which such evidence related should be found substantially contemporaneously with the property the subject of the charge; *R. v. Drage*, 1878, 14 Cox, C.C. 85 and *R. v. Carter*, 1884, 12 Q.B.D. 522; both decisions are now obsolete. The section is cumulative upon the common law as to proving guilty knowledge and other evidence is not restricted to the preceding 12 months. See *Archbold* 741. *Quaere*, does the section apply if the real case is larceny?

<sup>2</sup> *R. v. Dunn*, 1826, 1 Moo. C.C. 146.

<sup>3</sup> *R. v. Forster*, 1855, Dear, 456; and see *R. v. Weeks*, 1861, L. & C. 18.

money from E by pledging as a gold chain a chain which was only gilt, are deemed to be relevant, as showing his knowledge of the quality of the ring.<sup>1</sup>

(d) A is charged with obtaining money from B by false pretences, June 4th, 1909. The facts that on May 14th and July 3rd, 1909, A obtained goods from C and D by false pretences of a somewhat different character are deemed to be irrelevant, because they do not tend to establish the falsity of the pretences charged.<sup>2</sup>

(e) The question is, whether A and B, a brother and sister, committed incest in 1910. The facts that in 1907 (before the passing of the Punishment of Incest Act) they lived together as man and wife, and that B had a child in 1908 which she registered as A's and her own, are deemed to be relevant, as tending to show that cohabitation in 1910 was not innocent association as brother and sister.<sup>3</sup>

(f) A and B were accused of demanding money in November 1913 from the chairman of a company with menaces that they would cause the value of shares in the company to fall if the money was not paid. Evidence that they had received money from another company in the previous May after similar menaces was admitted to negative mistake or accident, and to prove a guilty mind [? intention].<sup>4</sup>

(g) A is accused of murdering his wife B with arsenic. Evidence that he subsequently administered arsenic to C is admissible to prove that this possession of arsenic previously to B's death was for the purpose of poisoning her.<sup>5</sup>

(h) A and B are charged with receiving, and C with giving money corruptly under the Prevention of Corruption Act, 1906. The contents of a paper written in thickets' language in C's possession showing previous payments to detectives and policemen are admissible to prove corruption.<sup>6</sup>

<sup>1</sup> *R. v. Francis*, 1874, L.R. 2 C.C.R. 128. The case of *R. v. Cooper*, 1875, 1 Q.B.D. (C.C.R.) 19, is similar to *R. v. Francis*, and perhaps stronger.

<sup>2</sup> *R. v. Fisher*, [1910] 1 K.B. 149; *R. v. Ellis*, [1910] 2 K.B. 746. See also *R. v. Ollis*, [1900] 2 Q.B. 758, and *R. v. Wyatt*, [1904] 1 K.B. 188.

<sup>3</sup> *R. v. Ball*, [1911] A.C. 47.

<sup>4</sup> *R. v. Boyle and Merchant*, [1914] 3 K.B. 339.

<sup>5</sup> *R. v. Armstrong*, [1922] 2 K.B. 555.

<sup>6</sup> *R. v. Cheshire, Lucas and Bottom*, 1927, 20 Cr. App. Rep. 47.

(i) The question is, whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee, if the payee had been a real person, is deemed to be relevant, as showing that A knew that the payee was a fictitious person.<sup>1</sup>

(j) A sues B for a malicious libel. Defamatory statements made by B regarding A for ten years before those in respect of which the action is brought are deemed to be relevant to show malice.<sup>2</sup>

(k) A is charged with the murder of an infant. He contends that the infant in question was the only one that he ever took into his house, and that he parted with it lawfully.

The facts that he took charge of other infants at low prices, and that remains of infants were found concealed in several premises successively occupied by him, are deemed to be relevant.<sup>3</sup>

(l) A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent, suffered loss.

The fact that, at the time when A represented C to be solvent, C was to A's knowledge supposed to be solvent by his neighbours and by persons dealing with him, is deemed to be relevant, as showing that A made the representation in good faith.<sup>4</sup>

(m) A is sued by B for the price of work done by B, by the order of C, a contractor, upon a house, of which A is owner.

A's defence is that B's contract was with C.

The fact that A paid C for the work in question is deemed to be relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A.<sup>5</sup>

(n) A is accused of stealing property which he had found,

<sup>1</sup> *Gibson v. Hunter*, 1794, 2 H.B. 288.

<sup>2</sup> *Barrett v. Long*, 1851, 3 H.L.C. 395, at p. 414.

<sup>3</sup> *Makin v. Attorney-General of New South Wales*, [1894] A.C. 57.

<sup>4</sup> *Sheen v. Bumpstead*, 1863, 2 H. & C. 193.

<sup>5</sup> *Gerish v. Charlier*, 1845, 1 C.B. 13.

and the question is, whether he meant to steal it when he took possession of it.

The fact that public notice of the loss of the property had been given in the place where A was, and in such a manner that A knew or probably might have known of it, is deemed to be relevant, as showing that A did not, when he took possession of it, in good faith believe that the real owner of the property could not be found.<sup>1</sup>

(o) The question is, whether A's death was caused by poison.

Statements made by A before his illness as to his state of health, and during his illness as to his symptoms, are deemed to be relevant facts.<sup>2</sup>

(p) The question is, what was the state of A's health at the time when an insurance on her life was effected by B?

Statements made by A as to the state of her health at or near the time in question are deemed to be relevant facts.<sup>3</sup>

(q) A was proceeded against for receiving metal knowing it to have been stolen. After evidence had been given that other metal stolen about three months previously had been found on A's premises, evidence that before his arrest he told a police officer that he had no metal on his premises as he had given up buying it was held admissible to prove guilty knowledge.<sup>4</sup>

## ARTICLE 13 \*

### FACTS SHOWING SYSTEM

When there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is deemed to be relevant.

\* See Note II.

<sup>1</sup> This illustration is adapted from *Preston's Case*, 1851, 2 Den. C.C. 353; but the misdirection given in that case is set right. As to the relevancy of the fact, see in particular Lord Campbell's remark on p. 359.

<sup>2</sup> *R. v. Palmer*, 1856. See my *Gen. View of Crim. Law*, pp. 238, 256 (evidence of Dr. Savage and Mr. Stephens).

<sup>3</sup> *Aveson v. Lord Kinnaird*, 1803, 6 E.A. 188.

<sup>4</sup> *R. v. George Smith*, [1918] 2 K.B. 415.

*Illustrations*

(a) A is accused of setting fire to his house in order to obtain money for which it is insured.

The facts that A had previously lived in two other houses successively, each of which he insured, in each of which a fire occurred, and that after each of those fires A received payment from a different insurance office, are deemed to be relevant, as tending to show that the fires were not accidental.<sup>1</sup>

(b) The question was, whether A, who was a regular customer of B, a barber, had contracted "barber's itch" through B's negligence. The fact that two witnesses who had been shaved at B's shop about two months previously had contracted the same disease was deemed to be relevant.<sup>2</sup>

(c) A is employed to pay the wages of B's labourers, and it is A's duty to make entries in a book showing the amounts paid by him. He makes an entry showing that on a particular occasion he paid more than he really did pay.

The question is, whether this false entry was accidental or intentional.

The fact that for a period of two years A made other similar false entries in the same book, the false entry being in favour of A in each case, is deemed to be relevant.<sup>3</sup>

(d) The question is, whether the administration of poison to A, by Z, his wife, in September 1848, was accidental or intentional.

The facts that B, C, and D (A's three sons), had the same poison administered to them in December 1848, March 1849, and April 1849, and that the meals of all four were prepared by Z, are deemed to be relevant, though Z was indicted separately for murdering A, B, and C, and attempting to murder D.<sup>4</sup>

<sup>1</sup> *R. v. Gray*, 1866, 4 F. & F. 1102. The author acted on this case at the Liverpool Assizes in 1882, but doubted its authority. It was mentioned without disapproval in the judgment of the Judicial Committee in *Makin v. The Attorney-General for New South Wales* (see below).

<sup>2</sup> *Hales v. Kerr*, [1908] 2 K.B. 601.

<sup>3</sup> *R. v. Richardson*, 1860, 2 F. & F. 343.

<sup>4</sup> *R. v. Geering*, 1849, 18 L.J. (M.C.) 215; cf. *R. v. Garner*, 1863, 3 F. & F. 681. See also *Makin v. The Attorney-General for New South Wales*, [1894] A.C. 57. The earlier cases were discussed in *R. v. Neill* (or *Cream*).

(e) A is charged with manslaughter and using instruments to procure miscarriage. The fact that the woman's husband had obtained A's address from another woman on whom A had operated is deemed to be relevant.<sup>1</sup>

(f) A promises to lend money to B on the security of a policy of insurance which B agrees to effect in an insurance company of his choosing. B pays the first premium to the company, but A refuses to lend the money except upon terms which he intends B to reject, and which B rejects accordingly.

The fact that A and the insurance company have been engaged in similar transactions is deemed to be relevant to the question whether the receipt of the money by the company was fraudulent.<sup>2</sup>

#### ARTICLE 14

##### EXISTENCE OF COURSE OF BUSINESS WHEN DEEMED TO BE RELEVANT<sup>3</sup>

When there is a question whether a particular act was done, the existence of any course of office or business according to which it naturally would have been done, is a relevant fact.

When there is a question whether a particular person held a particular public office, the fact that he acted in that office is deemed to be relevant.<sup>4</sup>

When the question is whether one person acted as agent

tried at the Central Criminal Court in October 1892, when Hawkins, J., admitted evidence of subsequent administrations of strychnine by the prisoner to persons other than and unconnected with the woman of whose murder the prisoner was then convicted. See *R. v. Armstrong*, [1922] 2 K.B. 555.

<sup>1</sup> *R. v. Lovegrove*, [1920] 3 K.B. 643.

<sup>2</sup> *Blake v. Albion Life Assurance Society*, 1878, 4 C.P.D. 94.

<sup>3</sup> As to presumptions arising from the course of office or business see Taylor, ss. 176-182; Best, s. 403; Phipson, 102; Halsbury, xii, p. 556. The presumption "*Omnia esse rite acta*" also applies; see Biecon's *Maxims* (8th ed., p. 737); Taylor, s. 143 *et seq.*; Best, ss. 353-365.

<sup>4</sup> Taylor, s. 171; Roscoe, 344.

for another on a particular occasion, the fact that he so acted on other occasions is deemed to be relevant.

### *Illustrations*

(a) The question is, whether a letter was sent on a given day.

The post-mark upon it is deemed to be a relevant fact.<sup>1</sup>

(b) The question is, whether a particular letter was despatched.

The facts that all letters put in a certain place were, in the common course of business, carried to the post, and that that particular letter was put in that place, are deemed to be relevant.<sup>2</sup>

(c) The question is, whether a particular letter reached A.

The facts that it was posted in due course properly addressed, and was not returned through the Dead Letter Office, are deemed to be relevant.<sup>3</sup>

(d) The facts stated in illustration (f) to the last article are deemed to be relevant to the question whether A was agent to the company.<sup>4</sup>

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<sup>1</sup> *R. v. Canning*, 1754, 19 S.T. 370.

<sup>2</sup> *Hetherington v. Kemp*, 1815, 4 Camp. 193; and see *Skilbeck v. Garbett*, 1845, 7 Q.B. 846, and *Trotter v. MacLean*, 1879, 13 Ch.D. 574.

<sup>3</sup> *Warren v. Warren*, 1834, 1 C.M. & R. 250; *Woodcock v. Houldsworth*, 1846, 16 M. & W. 124. Other cases on this subject are collected in *Roscoe*, 384.

<sup>4</sup> *Blake v. Albion Life Assurance Society*, 1878, 4 C.P.D. 94.

## CHAPTER IV

### *HEARSAY IRRELEVANT EXCEPT IN CERTAIN CASES*

#### ARTICLE 15 \*

##### *HEARSAY AND THE CONTENTS OF DOCUMENTS IRRELEVANT*

A STATEMENT, oral or written made otherwisc than by a witness in giving evidence; and

a statement contained or recordcd in any book, document, or record whatcver, proof of which is not admitted on other grounds,

arc deemed to be irrrelevant for the purpose of proving the truth of the matter stated, except in the cases mentioned in this chapter.

This Article does not apply to cases where the making of a statement is a fact in issue, or where evidence that a statement was made may be given under Articles 3 (facts forming one transaction), 4 (conspirators), 7 (motive, etc.), 8 (explanatory facts), 9 (statements explaining acts) and 10 (complaints).

#### *Illustrations*

(a) A is charged with an attempt to murder B. B in giving evidence attempts to exculpate A. A previous statement by B supporting the charge was not admitted to prove A's guilt.<sup>1/</sup>

\* See Note III.

<sup>1</sup> *R. v. Russell*, Leeds Spring Assizes, 1935, *The Times*, April 3rd and, on appeal, May 30th, 1935. See Wills, 142-144.

(b) A declaration by a deceased attesting witness to a deed that he had forged it is deemed to be irrelevant to the question of its authenticity.<sup>1</sup>

(c) The question is, whether A was born at a certain time and place. The fact that a public body for a public purpose stated that he was born at that time and place is deemed to be irrelevant, the circumstances not being such as to bring the case within the provisions of Article 35.<sup>2</sup>

(d) The question is, whether A slandered B. Evidence that A made the statement complained of is admissible as evidence because the making thereof is a fact in issue.

## SECTION I

### HEARSAY WHEN RELEVANT

#### ARTICLE 15A

##### HEARSAY RENDERED ADMISSIBLE BY THE EVIDENCE ACT, 1938<sup>3</sup>

In civil<sup>4</sup> proceedings<sup>5</sup> any statement (that is, any representation of fact whether made by words or other-

<sup>1</sup> *Stobart v. Dryden*, 1836, 1 M. & W. 615.

<sup>2</sup> *Sturya v. Freccia*, 1880, 5 App. Ca. 623.

<sup>3</sup> Evidence Act, 1938 (1 & 2 Geo. 6, c. 28), ss. 1 & 2. The language has been somewhat condensed and adapted to conform with the terminology of the Digest. The full text of the Act will be found at Appendix B *post*, p. 240A.

<sup>4</sup> The Act makes two fundamental changes in the law upon the trial of a civil action: (1) it permits a witness to support his oral testimony by producing in evidence the documents he made at the time for the Court to look at, instead of merely using them for the more limited and rather artificial process at common law of "refreshing his memory"; (2) it admits in evidence documentary statements although pure hearsay, and it even lets in a sort of double degree of hearsay in the case of information contained in registers, journals, log-books and the like where the compiler of the register, etc., is himself only acting on hearsay. These reforms are well suited to the present day when so few civil actions are tried with a jury (this part of the Act has no application to criminal trials), and moreover an important safeguard is provided in that the Act expressly confers on the judge trying a civil action with a jury a discretion to exclude any matter which would otherwise be admissible under its provisions.

The Act, by s. 6 (2) (a), expressly preserves all the existing common law grounds for admitting hearsay, such as declarations by deceased persons, etc.; see *post*, pp. 40-52.

wise) made in a document (including any book, map, plan, drawing or photograph) tending to establish the existence of some fact in proof whereof direct oral evidence would be admissible, shall, on production of the original document (or by leave<sup>1</sup> of the Court, a certified copy thereof approved by such Court) be admissible as evidence that such fact exists in all cases where the maker of the statement (that is to say, the person who wrote or otherwise produced it with his own hand or who signed or initialled it or otherwise in writing recognised it as one for the accuracy of which he was responsible) is called as a witness and the statement either deals with matters personally known to him or is contained in a document purporting to be, or to form part of a continuous record wherein he has made the statement in the performance of a duty to record information supplied to him by persons having, or reasonably to be supposed to have, personal knowledge of the matters stated, provided that the document shall be admissible, although the maker thereof is not called, if he is dead, unfit by reason of bodily or mental condition to attend, beyond the seas and his attendance is not reasonably practicable,<sup>2</sup> or if he cannot be found, or in any case where the Court in its discretion excuses his being called on the ground of delay or expense.

But no statement as aforesaid shall be admissible if at the time when the same was made litigation was pending or anticipated<sup>3</sup> involving the matter stated and the maker had an interest<sup>4</sup> therein.

<sup>1</sup> Given either at the trial or by previously on a summons in chambers (s. 1 (2)).

<sup>2</sup> See *Infields v. Rosen*, [1939] 1 A.E.R. 121.

<sup>3</sup> See *Robinson v. Stern*, [1939] 2 K.B. 260.

<sup>4</sup> On the analogy of the cases at common law dealing with disqualification from interest (see, e.g., *Jacobs v. Layborn*, 1843, 11 M. & W. 685).

¶ In deciding admissibility under the foregoing provisions the Court may draw any reasonable inference from the form or contents of the document containing the statement and, in deciding if a person is fit to attend as a witness, may act on a certificate purporting to be given by a doctor.

For the purpose of any rule of law or practice which requires corroboration or prescribes how uncorroborated evidence shall be treated, a statement admitted pursuant to this Article shall not be deemed corroboration of the evidence of its maker.

In actions tried with a jury the judge may in his discretion exclude any statement which would otherwise pursuant to this Article be admissible.

#### ARTICLE 16 \*

##### ADMISSIONS

An admission is a statement of fact, oral or written, made by or on behalf of any party to a judicial proceeding otherwise than in the manner described in Article 63,<sup>1</sup> which alleges or suggests an inference as to any fact in issue, or relevant or deemed to be relevant to the issue, which is adverse to the interests of such party in that proceeding.

Every admission is, subject to the rules hereinafter stated, deemed to be relevant to the truth of the matter

\* See Note IV.

this should mean that some advantage or detriment would as a certainty, and not merely contingently or probably, result to the witness from the event of the litigation. But in *Plomien Fuel Economiser v. National Marketing Board*, [1941] Ch. 248 it was held that the mere prospect of advantage disqualifies the witness's statement. But mere bias will not shut it out (see s. 2 (1) of the Act).

<sup>1</sup> Article 63 applies to admissions, made before the hearing with reference to the hearing, or by the pleadings or at the hearing. This Article refers to admissions made otherwise. Article 63 may be said to apply to formal, and this Article to informal admissions. An admission, e.g. made

stated as against the party by whom or on whose behalf it was made.

If a statement is made to a party to a judicial proceeding, or any one qualified to make admissions on his behalf, which is adverse to the interests of such party in that proceeding, and such statement is by word, conduct or demeanour accepted by or on behalf of that party as true, wholly or in part, the statement so made and accepted, to the extent to which it was so accepted, is deemed to be equivalent to a statement made by or on behalf of that party.<sup>1</sup>

#### ARTICLE 17

##### WHO MAY MAKE ADMISSIONS ON BEHALF OF OTHERS, AND WHEN<sup>2</sup>

Admissions may be made on behalf of the real party to any proceeding—

by any nominal party to that proceeding;

by any person who, though not a party to the proceeding, has a substantial interest in the event:

by any one who is privy in law, in blood, or in estate to any party to the proceeding, on behalf of that party.

A statement made by a party to a proceeding may be an admission whenever it is made, unless it is made by a person suing or sued in a representative character only,

<sup>1</sup> See Article 9 (statements made in the presence of a person), and *R. v. Christie* there quoted. For a full discussion by the Court of Appeal of the principles on which acceptance may be inferred see *Wiedemann v. Walpole*, [1891] 2 Q.B. 534 (C.A.), and see Wills, 153-157.

<sup>2</sup> As to admissions by parties see *Moriarty v. L. C. & D. Railway*, 1870, L.R. 5 Q.B. 314, per Blackburn, J.; *Alney v. George*, 1808, 1 Camp. 392; *Bauerman v. Radenius*, 1798, 7 T.R. 663; as to admissions by parties interested, see *Spargo v. Brown*, 1829, 9 B. & C. 935. See too Taylor, ss. 740-743; Best, ss. 529-531; Roscoe, 67 *et seq.*; and Phipson, 228-254.

in which case [it seems] it must be made whilst the person making it sustains that character.

A statement made by a person interested in a proceeding, or by a privy to any party thereto, is not an admission unless it is made during the continuance of the interest which entitles him to make it.<sup>1</sup>

### *Illustrations*

(a) The assignee of a bond sues the obligor in the name of the obligee.

An admission on the part of the obligee that the money due has been paid is deemed to be relevant on behalf of the defendant.<sup>2</sup>

(b) An admission by the assignee of the bond in the last illustration would also be deemed to be relevant on behalf of the defendant.

(c) A statement made by a person before he becomes the assignee of a bankrupt is not deemed to be relevant as an admission by him in a proceeding by him as such assignee.<sup>3</sup>

(d) Statements made by a person as to a bill of which he had been the holder are deemed not to be relevant as against the holder, if they are made after he has negotiated the bill.<sup>4</sup>

(e) A assigned performing rights in a play to B, and afterwards assigned motion picture rights to C with a warranty of his title. In an action by B against C for infringement of copyright a letter from A's agent to B identifying a play registered at Stationers Hall as the play assigned to B was admitted because it was derogatory of the title that A transferred to C.<sup>5</sup>

<sup>1</sup> In *Falcon v. Famous Players Film Co.*, see Illustration (e), a statement by an assignor of an interest made after the transfer in order to quiet the assignee's doubts about the assignor's title was held admissible as being sufficiently "during the continuance of the interest".

<sup>2</sup> *Hanson v. Parker*, 1749, 1 Wils. 257.

<sup>3</sup> *Fenwick v. Thornton*, 1827, M. & M. 51 (by Lord Tenterden). In *Smith v. Morgan*, 1839, 2 M. & R. 257, Tindal, C.J., decided exactly the reverse.

<sup>4</sup> *Pocock v. Billing*, 1824, 2 Bing. 269.

<sup>5</sup> *Falcon v. Famous Players Film Co.* [1926] 2 K.B. 474 (C.A.)

## ARTICLE 18

ADMISSIONS BY AGENTS AND PERSONS JOINTLY  
INTERESTED WITH PARTIES

Admissions may be made by agents authorised to make them either expressly or by the conduct of their principals: but a statement made by an agent is not an admission merely because if made by the principal himself it would have been one.

A report made by an agent to a principal is not an admission which can be proved by a third person.<sup>1</sup>

Partners and joint contractors are each other's agents for the purpose of making admissions against each other in relation to partnership transactions or joint contracts.

Barristers and solicitors are the agents of their clients for the purpose of making admissions whilst engaged in the actual management of the cause, either in court or in correspondence relating thereto; but statements made by a barrister or solicitor on other occasions are not admissions merely because they would be admissions if made by the client himself.

The fact that two persons have a common interest in the same subject-matter does not entitle them to make admissions respecting it as against each other.

In cases in which actions founded on a simple contract have been barred by the Statute of Limitations no joint contractor or his personal representative loses the benefit of such statute, by reason only of any written acknowledgment or promise made or signed by [or by the agent duly authorised to make such acknowledgment or promise of] any other or others of them [or by reason only of

<sup>1</sup> *Rc Devala Company*, 1883, 22 Ch.D. 593.

payment of any principal, interest, or other money, by any other or others of them].<sup>1</sup>

A principal, as such, is not the agent of his surety for the purpose of making admissions as to the matters for which the surety gives security.

### *Illustrations*

(a) The question is, whether a parcel, for the loss of which a Railway Company is sued, was stolen by one of their servants. Statements made by the station-master to a police officer, suggesting that the parcel had been stolen by a porter, are deemed to be relevant, as against the railway, as admission by an agent.<sup>2</sup>

(b) A allows his wife to carry on the business of his shop in his absence. A statement by her that he owes money for goods supplied to the shop is deemed to be relevant against him as an admission by an agent.<sup>3</sup>

(c) A sends his servant, B, to sell a horse. What B says at the time of the sale, and as part of the contract of sale, is deemed to be a relevant fact as against A, but what B says upon the subject at some different time is not deemed to be relevant as against A<sup>4</sup> [though it might have been deemed to be relevant if said by A himself].

(d) The question is, whether a ship remained at a port for an unreasonable time. Letters from the plaintiff's agent to the plaintiff containing statements which would have been admissions if made by the plaintiff himself, are deemed to be irrelevant as against him.<sup>5</sup>

(e) A, B, and C sue D as partners upon an alleged contract respecting the shipment of bark. An admission by A that the bark was his exclusive property and not the pro-

<sup>1</sup> 9 Geo. 4, c. 14, s. 1. The words in the first set of brackets were added by 19 & 20 Vict. c. 97, s. 13. The words in the second set by s. 14 of the same Act. The language is slightly altered.

<sup>2</sup> *Kirkstall Brewery v. Furness Ry.*, 1874, L.R. 9 Q.B. 468.

<sup>3</sup> *Clifford v. Burton*, 1823, 1 Bing. 199.

<sup>4</sup> *Helyear v. Hawke*, 1803, 5 Esp. 72.

<sup>5</sup> *Langhorn v. Allnutt*, 1812, 4 Tau. 511.

perty of the firm is deemed to be relevant as against B and C.<sup>1</sup>

(f) A, B, C, and D make a joint and several promissory note. Either can make admissions about it as against the rest.<sup>2</sup>

(g) The question is, whether A accepted a bill of exchange. A notice to produce the bill signed by A's solicitor and describing the bill as having been accepted by A is deemed to be a relevant fact.<sup>3</sup>

(h) The question is, whether a debt to A, the plaintiff, was due from B, the defendant, or from C. A statement made by A's solicitor to B's solicitor in common conversation that the debt was due from C is deemed not to be relevant against A.<sup>4</sup>

(i) One co-part-owner of a ship cannot, as such, make admissions against another as to the part of the ship in which they have a common interest, even if he is co-partner with that other as to other parts of the ship.<sup>5</sup>

(j) A is surety for B, a clerk. B being dismissed makes statements as to sums of money which he has received and not accounted for. These statements are not deemed to be relevant as against A, as admissions.<sup>6</sup>

## ARTICLE 19

### ADMISSION BY STRANGERS

Statements by strangers to a proceeding are not relevant as against the parties except in the cases hereinafter mentioned.<sup>7</sup>

In actions against sheriffs for not executing process against debtors, statements of the debtor admitting his

<sup>1</sup> *Lucas v. De La Cour*, 1813, 1 M. & S. 249.

<sup>2</sup> *Whitcomb v. Whiting*, 1781, 1 S.L.C. 641.

<sup>3</sup> *Holt v. Squire*, 1825, Ry. & Mo. 282.

<sup>4</sup> *Petch v. Lyon*, 1846, 9 Q.B. 147.

<sup>5</sup> *Jaggers v. Binnings*, 1815, 1 Star. 64.

<sup>6</sup> *Smith v. Whittingham*, 1833, 6 C. and P. 78. See also *Evans v. Beattie*, 1803, 5 Esp. 26; *Bacon v. Chesney*, 1816, 1 Star. 192; *Caermarthen Rly. Co. v. Manchester Rly. Co.*, 1873, L.R. 8 C.P. 685.

<sup>7</sup> *Coole v. Braham*, 1848, 3 Ex. 183. For a third exception, which could hardly occur now see *Clay v. Langslow*, 1827, M. & M. 45.

Debt to be due to the execution creditor are deemed to be relevant as against the sheriff.<sup>1</sup>

In actions by the trustees of bankrupts an admission by the bankrupt of the petitioning creditor's debt is deemed to be relevant as against the plaintiff.<sup>2</sup>

#### ARTICLE 20

##### ADMISSION BY PERSON REFERRED TO BY PARTY

When a party to any proceeding expressly refers to any other person for information in reference to a matter in dispute, the statements of that other person may be admissions as against the person who refers to him.<sup>3</sup>

##### *Illustration*

The question is, whether A delivered goods to B. B says "if C" (the carman) "will say that he delivered the goods, I will pay for them".<sup>4</sup>

#### ARTICLE 21

##### ADMISSIONS MADE WITHOUT PREJUDICE<sup>5</sup>

No admission is deemed to be relevant in any civil action if it is made either upon express condition that evidence of it is not to be given,<sup>6</sup> or under circumstances

<sup>1</sup> *Kempland v. Macauley*, 1791, Peake, 95; *Williams v. Bridges*, 1317, 2 Star, 42.

<sup>2</sup> *Jarrett v. Leonard*, 1814, 2 M. & S. 265 (adapted to the new law of bankruptcy).

<sup>3</sup> This comes very near to the case of arbitration. As to irregular arbitrations see Taylor, ss. 760-763; Phipson, 244-245.

<sup>4</sup> *Daniel v. Pitt*, 1808, 1 Camp. 366, n. See, too, *R. v. Mallory*, 1884, 13 Q.B.D. 33. This is a weaker illustration than *Daniel v. Pitt*.

<sup>5</sup> See Taylor, ss. 774, 795; Roscoe, 66; Phipson, 224; Halsbury, xiii. p. 703.

<sup>6</sup> *Cory v. Bretton*, 1830, 1 C. & P. 462. Such a statement made by a solicitor on behalf of his client is deemed to be irrelevant as against the solicitor in an action to which he is a party. *La Roche v. Armstrong*, [1922] 1 K.B. 485.

from which the judge infers that the parties agreed together that evidence of it should not be given,<sup>1</sup> or if it was made under duress.<sup>2</sup>

### Illustration

Negotiations for a compromise are begun by a letter marked "without prejudice"; all subsequent letters in the same negotiation are protected by this statement, though they are "open" in form.<sup>3</sup>

## ARTICLE 22

### CONFESSIONS DEFINED

A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime. Confessions, if voluntary, are deemed to be relevant facts as against the persons who make them only.

## ARTICLE 23 \*

### CONFESSIONS CAUSED BY INDUCEMENT, THREAT, OR PROMISE, WHEN IRRELEVANT IN CRIMINAL PROCEEDING

No confession is deemed to be voluntary if it appears to the judge to have been caused<sup>4</sup> by any inducement, threat, or promise, proceeding from a person in authority, and having reference to the charge against the accused person,

\* See Note V.

<sup>1</sup> *Paddock v. Forrester*, 1842, 3 M. & G. 903.

<sup>2</sup> *Stockfleth v. De Tastet*, 1814, per Lord Ellenborough, C.J., 4 Camp. 10.

<sup>3</sup> *Paddock v. Forrester*, *ubi supra*, and see *Walker v. Wilsher*, 1889, 23 Q.B.D. 335 (C.A.).

<sup>4</sup> See *R. v. Baldry*, 1852, 2 Den. 430; *R. v. Thompson*, [1893] 2 Q.B. 12; *Ibrahim v. R.*, [1914] A.C. 599 at pp. 609-612, and other cases mentioned in Note V, where the authorities are more fully considered.

whether addressed to him directly or brought to his knowledge indirectly;

and if, in the opinion of the judge, such inducement, threat, or promise gave the accused person reasonable grounds for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceedings against him.

A confession is not involuntary only because it appears to have been caused by the exhortations of a person in authority to make it as a matter of religious duty, or by an inducement collateral to the proceeding, or by inducements held out by a person not in authority.

The prosecutor, officers of justice having the prisoner in custody, magistrates, and other persons in similar positions, are persons in authority. The master of the prisoner is not, as such, a person in authority if the crime of which the person making the confession is accused was not committed against him.

A confession is deemed to be voluntary if, in the opinion of the judge, it is shown to have been made after the complete removal of the impression produced by any inducement, threat, or promise which would otherwise render it involuntary.

Before a confession can be treated as relevant in a criminal trial it must be proved affirmatively that it was free and voluntary.<sup>1</sup>

Facts discovered in consequence of confessions improperly obtained, and so much of such confessions as distinctly relate to such facts, may be proved.

<sup>1</sup> *R. v. Thompson*, [1893] 2 Q.B. 12. The early authorities on the admission of confessions are summed up in this case by Cave, J., who describes a "free and voluntary statement" as one which was not "preceded by any inducement to make a statement held out by a person in authority".

*Illustrations*

(a) The question is, whether A murdered B.

A handbill issued by the Secretary of State, promising a reward and pardon to any accomplice who would confess, is brought to the knowledge of A, who, under the influence of the hope of pardon, makes a confession. This confession is not voluntary.<sup>1</sup>

(b) A being charged with the murder of B, the chaplain of the gaol reads the Commination Service to A, and exhorts him upon religious grounds to confess his sins. A, in consequence, makes a confession. This confession is voluntary.<sup>2</sup>

(c) The gaoler promises to allow A, who is accused of a crime, to see his wife, if he will tell where the property is. A does so. This is a voluntary confession.<sup>3</sup>

(d) A is accused of child murder. Her mistress holds out an inducement to her to confess, and she makes a confession.<sup>4</sup> This is a voluntary confession, because her mistress is not a person in authority.<sup>4</sup>

(e) A is accused of the murder of B. C, a magistrate, tries to induce A to confess by promising to try to get him a pardon if he does so. The Secretary of State informs C that no pardon can be granted, and this is communicated to A. After that A makes a statement. This is a voluntary confession.<sup>5</sup>

(f) A, accused of burglary, makes a confession to a policeman under an inducement which prevents it from being voluntary. Part of it is that A had thrown a lantern into a

<sup>1</sup> *R. v. Boswell*, 1842, Car. & Marsh. 584.

<sup>2</sup> *R. v. Gilham*, 1828, 1 Moo. C.C. 186. In this case the exhortation was that the accused man should confess "to God", but it seems from parts of the case that he was urged also to confess to man "to repair any injury done to the laws of his country". According to the practice at that time, no reasons are given for the judgment. The principle seems to be that a man is not likely to tell a falsehood in such cases, from religious motives. The case is sometimes cited as an authority for the proposition that a clergyman may be compelled to reveal confessions made to him professionally. It has nothing to do with the subject.

<sup>3</sup> *R. v. Lloyd*, 1834, 6 C. & P. 393.

<sup>4</sup> *R. v. Moore*, 1852, 2 Den. C.C. 522.

<sup>5</sup> *R. v. Clewes*, 1830, 4 C. & P. 221.

certain pond. The fact that he said so, and that the lantern was found in the pond in consequence, may be proved.<sup>1</sup>

### ARTICLE 24

#### CONFessions MADE UPON OATH, ETC.

Evidence amounting to a confession may be used as such against the person who gives it, although it was given upon oath, and although the proceeding in which it was given had reference to the same subject-matter as the proceeding in which it is to be proved, and although the witness might have refused to answer the questions put to him; but if, after refusing to answer any such question, the witness is improperly compelled to answer it, his answer is not a voluntary confession.<sup>2</sup>

#### *Illustrations*

(a) The answers given by a bankrupt in his examination may be used against him in a prosecution for offences against the law of bankruptcy.<sup>3</sup>

(b) A is charged with maliciously wounding B.

Before the magistrates A appeared as a witness for C, who was charged with the same offence. A's deposition may be used against him on his own trial.<sup>4</sup>

### ARTICLE 25

#### CONFession MADE UNDER A PROMISE OF SECRECY

If a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of

<sup>1</sup> *R. v. Gould*, 1840, 9 C. & P. 364. This is not consistent, so far as the proof of the words goes, with *R. v. Warwickshall*, 1783, 1 Leach, 263.

<sup>2</sup> *R. v. Garbett*, 1847, 1 Den. 236. See also *R. v. Owen*, 1888, 20 Q.B.D. 829, as explained in *R. v. Paul*, 1890, 25 Q.B.D. 202.

<sup>3</sup> *R. v. Scott*, 1856, 1 D. & B. 47; 25 L.J. (M.C.) 128; *R. v. Robinson*, 1867, 1 C.C.R. 80; *R. v. Widdop*, 1872, L.R. 2 C.C.R. 3; *R. v. Erdheim*, [1896] 2 Q.B. 260. There are, however, certain restrictions on making use of such answers. See, *post*, Article 129 and notes thereto.

<sup>4</sup> *R. v. Chidley & Cummins*, 1860, 8 Cox, C.C. 365.

secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.<sup>1</sup>

### ARTICLE 26

#### STATEMENTS BY DECEASED PERSONS, WHEN DEEMED TO BE RELEVANT

Statements written or oral of facts in issue or relevant or deemed to be relevant to the issue are deemed to be relevant if the person who made the statement is dead, in the cases, and on the conditions, specified in Articles 27-32, both inclusive. In each of those articles the word "declaration" means such a statement as is herein mentioned, and the word "declarant" means a dead person by whom such a statement was made in his lifetime.

### ARTICLE 27

#### DYING DECLARATION AS TO CAUSE OF DEATH<sup>2</sup>

A declaration made by the declarant as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, is deemed to be relevant—

<sup>1</sup> But see pp. 195-197, *post*. A list of cases is given in Taylor, s. 881.

<sup>2</sup> As to dying declarations generally see Taylor, ss. 714-722; Best, s. 505; Russ. Cri., 1922-1932; Roscoe, Crim. Ev., 31-36; Phipson, 308-312. See also *R. v. Baker*, 1837, 2 Mo. & Ro. 53.

only in trials for the murder or manslaughter of the declarant; and

only when the declarant is shown, to the satisfaction of the judge, to have been in actual danger of death, and to have given up all hope of recovery at the time when his declaration was made.

Such a declaration is not irrelevant merely because it was intended to be made as a deposition before a magistrate, but is irregular.

#### *Illustrations*

(a) The question is, whether A has murdered B.

B makes a statement to the effect that A murdered him. B at the time of making the statement has no hope of recovery, though his doctor had such hopes, and B lives ten days after making the statement. The statement is deemed to be relevant.<sup>1</sup>

B, at the time of making the statement (which is written down), says something, which is taken down thus: "I make the above statement with the fear of death before me, and with no hope of recovery". B, on the statement being read over, corrects this to "with no hope *at present* of my recovery". B dies thirteen hours afterwards. The statement is deemed to be irrelevant.<sup>2</sup>

(b) The question is, whether A administered drugs to a woman with intent to procure abortion. The woman makes a statement which would have been admissible had A been on his trial for murder. The statement is deemed to be irrelevant.<sup>3</sup>

(c) The question is, whether A murdered B. A dying declaration by C that he (C) murdered B is deemed to be irrelevant.<sup>4</sup>

(d) The question is, whether A murdered B.

<sup>1</sup> *R. v. Mosley*, 1825, 1 Moo. 97.

<sup>2</sup> *R. v. Jenkins*, 1869, 1 C.C.R. 187. See also *R. v. Perry*, [1909] 2 K.B. 697.

<sup>3</sup> *R. v. Hind*, 1860, Bell, 253, following *R. v. Hutchinson*, 1824, 2 B. & C. 608 n., quoted in a note to *R. v. Mead*, *ibid.*

<sup>4</sup> *Gray's Case*, 1841, Ir. Cir. Rep. 76.

B makes a statement before a magistrate on oath, and makes her mark to it, and the magistrate signs it, but not in the presence of A, so that her statement was not a deposition within the statute then in force. B, at the time when the statement was made, was in a dying state, and had no hope of recovery. The statement is deemed to be relevant.<sup>1</sup>

### ARTICLE 28

#### DECLARATIONS MADE IN THE COURSE OF BUSINESS OR PROFESSIONAL DUTY

A declaration is deemed to be relevant when it was made by the declarant in the ordinary course of business, and in the discharge of professional duty, at or near the time when the matter stated occurred,<sup>2</sup> and of his own knowledge.

Such declarations are deemed to be irrelevant except so far as they relate to the matter which the declarant stated in the ordinary course of his business or duty, or if they do not appear to be made by a person duly authorised to make them.

#### *Illustrations*

(a) The question is, whether A delivered certain beer to B.

The fact that a deceased drayman of A's on the evening of the delivery made an entry to that effect in a book kept for the purpose, in the ordinary course of business, is deemed to be relevant.<sup>3</sup>

(b) The question is, what were the contents of a letter not produced after notice.

A copy entered immediately after the letter was written,

<sup>1</sup> *R. v. Woodcock*, 1789, 1 East, P.C. 356. In this case, Eyre, C.B., is said to have left to the jury the question, whether the deceased was not in fact under the apprehension of death: 1 Leach, 504. It is now settled that the question is for the judge. See, *post*, Article 105.

<sup>2</sup> *Doe v. Turford*, 1832, 3 B. & Ad. 890. See generally Taylor, ss. 697-712; Best, 501, Roscoe, N.P. 59-60; Phipson, 278-284; Halsbury, xiii, pp. 588-591; and the note to *Price v. Torrington* in Smith's L.C.

<sup>3</sup> *Price v. Torrington*, 1703, 2 Smith's L.C. 277.

in a book kept for that purpose, by a deceased clerk, is deemed to be relevant.<sup>1</sup>

(c) The question is, whether A was arrested at Paddington or in South Molton Street.

A certificate annexed to the writ by a deceased sheriff's officer, and returned by him to the sheriff, is deemed to be relevant so far as it relates to the fact of the arrest; but irrelevant so far as it relates to the place where the arrest took place.<sup>2</sup>

(d) The course of business was for A, a workman in a coalpit, to tell B, the foreman, what coals were sold, and for B (who could not write) to get C to make entries in a book accordingly.

The entries (A and B being dead) are deemed to be irrelevant, because B, for whom they were made, did not know them to be true.<sup>3</sup>

(e) The question is, what is A's age. A statement by the incumbent in a register of baptisms that he was baptized on a given day is deemed to be relevant. A statement in the same register that he was born on a given day is deemed to be irrelevant, because it was not the incumbent's duty to make it.<sup>4</sup>

(f) The question is, whether A was married. Proceedings in a college book, which ought to have been but was not signed by the registrar of the college, were held to be irrelevant.<sup>5</sup>

#### ARTICLE 29 \*

##### DECLARATIONS AGAINST INTEREST<sup>6</sup>

A declaration is deemed to be relevant if the declarant had peculiar means of knowing the matter stated, if he

\* See Note VI.

<sup>1</sup> *Prill v. Fairclough*, 1812, 3 Camp. 305.

<sup>2</sup> *Chambers v. Bernasconi*, 1834, 1 C. M. & R. 347; see, too, *Smith v. Blakey*, 1867, L.R. 2 Q.B. 326.

<sup>3</sup> *Baird v. Preece*, 1843, 11 M. & W. 773.

<sup>4</sup> *R. v. Clapham*, 1829, 4 C. & P. 29. Cf. *Massey v. Allen*, 13 Ch.D. 558.

<sup>5</sup> *Fox v. Bearblock*, 1881, 17 Ch.D. 429.

<sup>6</sup> As to this subject generally see the discussion of *Higlam v. Ridgway* in 2 S.L.C. pp. 284 ff.; also Taylor, s<sup>e</sup>. 668-696a; Best, s. 500 *Roscoe* 549; *Phipson*, 278-286; *Halsbury* xiii. pp. 585-588.

had no interest to misrepresent it, and if it was opposed to his pecuniary or proprietary interest.<sup>1</sup> The whole of any such declaration, and of any other statement referred to in it, is deemed to be relevant, although matters may be stated which were not against the pecuniary or proprietary interest of the declarant; but statements, not referred to in, or necessary to explain such declarations, are not deemed to be relevant merely because they were made at the same time or recorded in the same place.<sup>2</sup>

A declaration may be against the pecuniary interest of the person who makes it, if part of it charges him with a liability, though other parts of the book or document in which it occurs may discharge him from such liability in whole or in part, and [it seems] though there may be no proof other than the statement itself either of such liability or of its discharge in whole or part.<sup>3</sup>

A statement made by a declarant holding a limited interest in any property and opposed to such interest is deemed to be relevant only as against those who claim under him, and not as against the reversioner.<sup>4</sup>

An endorsement or memorandum of a payment made upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment was made, is not sufficient proof of such payment to take the case out of the operation of the Statutes of Limitation;<sup>5</sup> but any such declaration made in any other form by or by the direction of the person to whom the payment

<sup>1</sup> These are almost the exact words of Bayley, J., in *Gleadow v. Atkin*, 1833, 1 Cromp. & M. at p. 423. The interest must not be too remote: *Smith v. Blakey*, 1867, L.R. 2 Q.B. 326.

<sup>2</sup> Illustrations (a), (b), and (c). See also p. 195, *post*.

<sup>3</sup> Illustrations (d) and (e).

<sup>4</sup> Illustration (g); see Lord Campbell's judgment in case there quoted, at p. 177.

<sup>5</sup> 5 Geo. 4, c. 14, s. 3.

was made is, when such person is dead, sufficient proof for the purpose aforesaid.<sup>1</sup>

Any indorsement or memorandum to the effect above mentioned made upon any bond or other specialty by a deceased person, is regarded as a declaration against the proprietary interest of the declarant for the purpose above mentioned, if it is shown to have been made at the time when it purports to have been made;<sup>2</sup> but it is uncertain whether the date of such indorsement or memorandum may be presumed to be correct without independent evidence.<sup>3</sup>

Statements of relevant facts opposed to any other than the pecuniary or proprietary interest of the declarant are not deemed to be relevant as such.<sup>4</sup>

#### *Illustrations*

(a) The question is, whether a person was born on a particular day.

Entries in the books of a deceased man-midwife are deemed to be relevant;<sup>5</sup> taken together they read:

"W. Fowden junr.'s wife,  
Filius circa hor. 3 post merid. natus &c.  
W. Fowden, Junr., 1768.  
Apr. 22, filius natus,  
Wife, £1 6s. id.,  
Pd. 25 Oct., 1768."

<sup>1</sup> *Bradley v. James*, 1853, 13 C.B. 822. *Newbould v. Smith*, 1885, 29 Ch.D. 882, seems scarcely consistent with this. It was a decision of North, J. On appeal, 1886, 33 Ch.D. 127, the Court expressed no opinion on the admissibility of the entry rejected by North, J.; and see, too, the appeal to the House of Lords, 1889, 14 App. Ca. 423, where the same was the case.

<sup>2</sup> 3 & 4 Will. 4, c. 42 s. 3, which is the Statute of Limitations relating to Specialties, has no provision similar to 9 Geo. 4, c. 14, s. 3. Hence, in this case the ordinary rule is unaltered.

<sup>3</sup> See the question discussed in Taylor, ss. 692-696; and see Article 91.

<sup>4</sup> Illustration (h).

<sup>5</sup> *Higham v. Ridgway*, 1808, 10 East, 109; 10 R.R. 235.

(b) The question is, whether a certain custom exists in a part of a parish.

The following entries in the parish books, signed by deceased churchwardens, are deemed to be relevant:

"It is our ancient custom thus to proportion church-lay. The chapelry of Haworth pay one-fifth, etc."

Followed by—

"Received of Haworth, who this year disputed this our ancient custom, but after we had sued him, paid it accordingly—£8, and £1 for costs."<sup>1</sup>

(c) The question is, whether a gate on certain land, the property of which is in dispute, was repaired by A.

An account by a deceased steward, in which he charges A with the expense of repairing the gate is deemed to be irrelevant, though it would have been deemed to be relevant if it had appeared that A admitted the charge.<sup>2</sup>

(d) The question is, whether A received rent for certain land.

A deceased steward's account, charging himself with the receipt of such rent for A, is deemed to be relevant, although the balance of the whole account is in favour of the steward.<sup>3</sup>

(e) The question is, whether certain repairs were done at A's expense.

A bill for doing them, receipted by a deceased carpenter, is deemed to be <sup>{</sup>relevant<sup>4</sup> } <sub>{</sub>irrelevant<sup>5</sup> } there being no other evidence either that the repairs were done or that the money was paid.

(f) The question is, whether A (deceased) gained a settlement in the parish of B by renting a tenement.

A statement made by A, whilst in possession of a house, that he had paid rent for it, is deemed to be relevant, be-

<sup>1</sup> *Stead v. Heaton*, 1792, 4 T.R. 669.

<sup>2</sup> *Doe v. Beviss*, 1849, 7 C.B. 456.

<sup>3</sup> *Williams v. Geaves*, 1838, 8 C. & P. 592.

<sup>4</sup> *R. v. Lower Heyford*, 1840, note to *Higham v. Ridgway*, 1808,

<sup>2</sup> *Smith's L.C.* 296.

<sup>5</sup> *Doe v. Vowles*, 1833, 1 Mo. & Ro. 261. In *Taylor v. Witham*, 1876,

<sup>3</sup> Ch.D. 605, Jessel, M.R., followed *R. v. Lower Heyford*, and dissenting from *Doe v. Vowles*.

cause it reduces the interest which would otherwise be inferred from the fact of A's possession.<sup>1</sup>

(g) The question is, whether there is a right of common over a certain field.

A statement by A, a deceased tenant for a term of the land in question, that he had no such right, is deemed to be relevant as against his successors in the term, but not as against the owner of the field.<sup>2</sup>

(h) The question is, whether A was lawfully married to B.

A statement by a deceased clergyman that he performed the marriage under circumstances which would have rendered him liable to a criminal prosecution, is not deemed to be relevant as a statement against interest.<sup>3</sup>

(i) The question is, whether the posthumous illegitimate child of A is entitled to compensation for the death of his father under the Workmen's Compensation Act.

Statements by A to the effect that he was the father of the child and intended to marry the mother before its birth and to support the child are not deemed to be relevant as being against A's interest.<sup>4</sup>

## ARTICLE 30

### DECLARATIONS BY TESTATORS AS TO CONTENTS OF WILL

The declarations of a deceased testator as to his testamentary intentions, and as to the contents of his will, are deemed to be relevant—

when his will has been lost, and when there is a question as to what were its contents; and

when the question is whether an existing will is genuine or was improperly obtained; and

<sup>1</sup> *R. v. Exeter*, 1869, L.R. 4 Q.B. 341. And see *Homes v. Newman*, [1931] 2 Ch. 112, *ante* p. 18.

<sup>2</sup> *Papendick v. Bridgewater*, 1855, 5 E. & B. 166.

<sup>3</sup> *Sussex Peerage Case*, 1844, 11 C. & F. at p. 108.

<sup>4</sup> *Lloyd v. Powell Duffryn Coal Co.*, [1913] 2 K.B. 130. (C.A.). The statements are summarised as favourably as possible to the view that they were against interest. The decision was reversed by the House of Lords, [1914] A.C. 733, where it was argued and decided on other grounds. See note 5 to Article 32, p. 50.

when the question is whether any and which of more existing documents than one constitute his will.

In all these cases it is immaterial whether the declarations were made before or after the making or loss of the will.<sup>1</sup>

### ARTICLE 31 \*

#### DECLARATIONS AS TO PUBLIC AND GENERAL RIGHTS<sup>2</sup>

Declarations are deemed to be relevant (subject to the third condition mentioned in the next article) when they relate to the existence of any public or general right or custom or matter of public or general interest.<sup>3</sup> But declarations as to particular facts from which the existence of any such public or general right or custom or matter of public or general interest may be inferred, are deemed to be irrelevant.

A right is public if it is common to all His Majesty's subjects, and declarations as to public rights are relevant whoever made them.

A right or custom is general if it is common to any considerable number of persons, as the inhabitants of a parish, or the tenants of a manor.

Declarations as to general rights are deemed to be relevant.

\* See Note VII.

<sup>1</sup> *Sugden v. St. Leonards*, 1876, L.R. 1 P.D. (C.A.) 154: and see *Gould v. Lakes*, 1880, L.R. 6 P.D. 1. In questions between the heir and the legatee or devisee such statements would probably be relevant as admissions by a privy in law, estate, or blood; *Gould v. Lakes*, 1880, L.R. 6 P.D. 1; *Doe v. Palmer*, 1851, 16 Q.B. 747. The decision in this case at p. 757, followed by *Quick v. Quick*, 1864, 3 Sw. & Tr. 442, is overruled by *Sugden v. St. Leonards*.

<sup>2</sup> See generally Taylor, ss. 607-634; Best, s. 497; Roscoe, 50-54; Phipson, 285-296. Article 5 has much in common with this article. See per Lord Blackburn in *Neill v. Duke of Devonshire*, 1882, L.R. 8 App. Ca., pp. 186, 187; *Weeks v. Sparke*, 1813 1 M. & S. 679.

<sup>3</sup> As to whether a map relating to a public right is deemed to be relevant to a question of private right see *Stoney v. Eastbourne R.D.C.*, [1827] 1 Ch. 367 at pp. 380, 396, 401, 406.

vant only when they were made by persons<sup>1</sup> who are shown, to the satisfaction of the judge, or who appear from the circumstances of their statement, to have had competent means of knowledge.

Such declarations may be made in any form and manner.

### *Illustrations*

(a) The question is, whether a road is public.

A statement by A (deceased) that it is public is deemed to be relevant.<sup>2</sup>

A statement by A (deceased) that he planted a willow (still standing) to show where the boundary of the road had been when he was a boy is deemed to be irrelevant.<sup>3</sup>

(b) The following are instances of the manner in which declarations as to matters of public and general interest may be made: They may be made in—

maps prepared by or by the direction of persons interested in the matter<sup>4</sup> or their predecessors in interest;<sup>4</sup>

copies of Court rolls;<sup>5</sup>

deeds and leases between private persons;<sup>6</sup>

verdicts, judgments, decrees, and orders of Courts, and similar bodies<sup>7</sup> if final.<sup>8</sup>

## ARTICLE 32

### DECLARATIONS AS TO PEDIGREE<sup>9</sup>

A declaration is deemed to be relevant (subject to the conditions hereinafter mentioned) if it relates to the exist-

<sup>1</sup> *Crease v. Barrett*, per Parke, B., 1835, 1 C.M. & R. at p. 929.

<sup>2</sup> *R. v. Bliss*, 1835, 7 A. & E. 550.

<sup>3</sup> Implied in *Hammond v. Bradstreet*, 1854, 10 Ex. 390, and *Pipe v. Fulcher*, 1858, 1 E. & E. 111. In each of these cases the map was rejected as not properly qualified.

<sup>4</sup> *Stoney v. Eastbourne*, *ubi supra*, at p. 392.

<sup>5</sup> *Crease v. Barrett*, 1835, 1 C. M. & R. at p. 928.

<sup>6</sup> *Plaxton v. Dare*, 1829, 10 B. & C. 17.

<sup>7</sup> *Duke of Newcastle v. Broxlowe*, 1832, 4 B. & Ad. 273.

<sup>8</sup> *Pim v. Currell*, 1840, 6 M. & W. 234, 266.

<sup>9</sup> See generally the *Berkeley Peerage Case*, mentioned below, note 3, p. 51, and *Davies v. Lowndes*, 1843, 6 M. & G. 471, particularly at

ence of any relationship between persons, whether living or dead, or to the birth, marriage, or death of any person, by which such relationship was constituted, or to the time or place at which any such fact occurred, or to any fact immediately connected with its occurrence.<sup>1</sup>

Such declarations may express either the personal knowledge of the declarant, or information given to him by other persons qualified to be declarants, but not information collected by him from persons not qualified to be declarants.<sup>2</sup> They may be made in any form and in any document or upon anything in which statements as to relationship are commonly made.<sup>3</sup>

The conditions above referred to are as follows:

(1) Such declarations are deemed to be relevant only in cases in which the pedigree to which they relate is in issue, and not to cases in which it is only relevant to the issue.<sup>4</sup>

(2) They must be made by a declarant shown to be legitimately related by blood to the person to whom they relate; or by the husband or wife of such a person;<sup>5</sup> except that,

pp. 525-529, where the question of family pedigrees is fully discussed; also Taylor, ss. 635-567; Roscoe, 46-50; Phipson, 297-307. As to declarations of birth see *Shields v. Boucher*, 1847, 1 De G. & S. 49-50.

<sup>1</sup> Illustration (a).

<sup>2</sup> *Davies v. Lowndes*, 1843, 6 M. & G. at p. 527.

<sup>3</sup> Illustration (d).

<sup>4</sup> Illustration (b).

<sup>5</sup> *Shrewsbury Peirage Case*, 1857, 7 H.L.C. 26. For Scotch Law, see *Lauderdale Peirage Case*, 1885, L.R. 10 App. Ca. 692; also *Loyal Peirage Case*, 1885, *ibid.* 763. Statements by a dead man admitting his paternity of an unborn child and indicating his intention to marry the mother were held admissible under the Workmen's Compensation Act, 1906, to prove paternity and dependency by creating a reasonable anticipation that the child would be supported by the father: *Lloyd v. Powell Duffryn Coal Co.*, [1914] A.C. 733, reversing the C.A. (see p. 47 *supra*). The House of Lords held that the statements were admissible not on the ground of pedigree nor as against interest but simply as part of the *res gestae* (see Arts. 8-9).

- (a) a declaration by a deceased parent that he or she did not marry the other parent till after the birth of the child is relevant to prove the illegitimacy of such child;<sup>1</sup> and
- (b) in proceedings under the Legitimacy Act, 1926 (16 & 17 Geo. 5, c. 60), a declaration made by a person who, if a decree of legitimacy were granted, would stand towards the petitioners in any of the relationships mentioned in paragraph (2) hereof, is deemed relevant to the question of the identity of the parents of the petitioner.<sup>2</sup>

(3) They must be made before the question in relation to which they are to be proved has arisen; but they do not cease to be deemed to be relevant because they were made for the purpose of preventing the question from arising.<sup>3</sup>

This condition applies also to statements as to public and general rights or customs and matters of public and general interest.

#### *Illustrations*

(a) The question is, which of three sons (Fortunatus, Stephanus, and Achaicus) born at a birth is the eldest.

The fact that the father said that Achaicus was the youngest, and he took their names from St. Paul's Epistles (see 1 Cor. xvi. 17), and the fact that a relation present at the birth said that she tied a string round the second child's arm to distinguish it, are relevant.<sup>4</sup>

(b) The question is, whether A, sued for the price of horses and pleading infancy, was on a given day an infant or not.

<sup>1</sup> *Goodright v. Moss*, 1777, 2 Cowp. 591; *Murray v. Milner*, 1879, 12 Ch.D. 845; *in re Turner*, *Glenister v. Harding*, 1885, 29 Ch.D. 985.

<sup>2</sup> *In re Davy*, [1935] P. 1.

<sup>3</sup> *Berkeley Peerage Case*, 1811, 4 Cam. 401-417; and see *Lovat Peerage*, 1885, 10 App. Ca. 797. See also *In re Davy*, *ubi supra*.

<sup>4</sup> *Vin. Abr.*, 1731, *tit.* Evidence, T. b. 91. The report calls the son Achicus.

The fact that his father stated in an affidavit in a Chancery suit to which the plaintiff was not a party, that A was born on a certain day, is irrelevant.<sup>1</sup>

(c) The question is, whether one of the *cestuis que vie* in a lease for lives is living.

The fact that he was believed in his family to be dead is deemed to be irrelevant, as the question is not one of pedigree.<sup>2</sup>

(d) The following are instances of the ways in which statements as to pedigree may be made: By family conduct or correspondence; in books used as family registers; in deeds and wills; in inscriptions on tombstones, or portraits; in pedigrees, so far as they state the relationship of living persons known to the compiler.<sup>3</sup>

### ARTICLE 33 \*

#### EVIDENCE GIVEN IN FORMER PROCEEDINGS WHEN RELEVANT<sup>4</sup>

Evidence given by a witness in a previous action is relevant for the purpose of proving the matter stated in a subsequent proceeding.

All evidence taken at the hearing or trial of any cause or matter may be used in any subsequent proceeding in the same cause or matter.<sup>5</sup>

Evidence given in an earlier may be used in a later stage of the same proceeding, when the witness is dead,<sup>6</sup>

\* See Note VIII.

<sup>1</sup> *Haines v. Guthrie*, 1884, 13 Q.B.D. 818. In this case all the authorities on this point are fully considered.

<sup>2</sup> *Whittuck v. Waters*, 1830, 4 C. & P. 375.

<sup>3</sup> In Taylor, ss. 648-652; and Roscoe, 46-50, these and many other forms of statement of the same sort are mentioned; and see *Davies v. Lowndes*, 1843, 6 M. & G. at pp. 526, 527.

<sup>4</sup> See generally Taylor, ss. 464-799; Roscoe, 117-118; Phipson, 422-426.

<sup>5</sup> R.S.C. O. XXXVII, r. 25.

<sup>6</sup> *Mayor of Doncaster v. Day*, 1810, 3 Taunt. 262.

or mad,<sup>1</sup> or so ill that he will probably never be able to travel,<sup>2</sup> or is kept out of the way by the adverse party,<sup>3</sup> or in civil, but not it seems in criminal, cases, is out of the jurisdiction of the Court,<sup>4</sup> or perhaps, in civil, but not in criminal, cases, when he cannot be found.<sup>5</sup>

Provided in all cases—

(1) That the person against whom the evidence is to be given had the right and opportunity to cross-examine the declarant when he was examined as a witness;<sup>6</sup>

(2) That the questions in issue were substantially the same in the first as in the second proceeding;<sup>6</sup>

Provided also—

(3) That the proceeding, if civil, was between the same parties or their representatives in interest;<sup>8</sup>

(4) That, in criminal cases, the same person is accused upon the same facts.<sup>7</sup>

If evidence is reduced to the form of a deposition, the provisions of Article 97 (matters reduced to writing) apply to the proof of the fact that it was given.

The conditions under which depositions may be used as evidence are stated in Articles 154-158.

<sup>1</sup> *R. v. Eriswell*, 1790, 3 T.R. 720.

<sup>2</sup> *R. v. Hogg*, 1833, 6 C. & P. 176.

<sup>3</sup> *R. v. Scaife*, 1851, 17 Q.B. 238, 243.

<sup>4</sup> *Fry v. Wood*, 1737, 1 Atk. 444; *R. v. Scaife*, 1851, 17 Q.B. at p. 243.

<sup>5</sup> *Godbolt*, 1623, p. 326, case 418; *R. v. Scaife*, 1851, 17 Q.B. at p. 243.

<sup>6</sup> *Wright v. Doe*, 1834, 1 A. & E. 3, 19; *Doe v. Derby*, 1834, 1 A. & E. 783, 785, 789. See, as a late illustration, as to privies in estate, *Llanover v. Homfray*, 1880, 19 Ch.D. 224. In this case the first set of proceedings was between lords of the same manor and tenants of the same manor as the parties to the second suit.

<sup>7</sup> See Criminal Justice Act, 1925, s. 13 (3), replacing in part s. 17 of the Indictable Offences Act, 1848.

## SECTION II

STATEMENTS IN BOOKS, DOCUMENTS AND  
RECORDS, WHEN RELEVANT

## ARTICLE 34

RECITALS OF PUBLIC FACTS IN STATUTES AND PRO-  
CLAMATIONS

When any act of state or any fact of a public nature is in issue, or is or is deemed to be relevant to the issue, any statement of it made in a recital contained in any public Act of Parliament, or in any Royal proclamation or speech of the Sovereign in opening Parliament, or in any address to the Crown of either House of Parliament, is deemed to be a relevant fact.<sup>1</sup>

## ARTICLE 35

RELEVANCY OF ENTRY IN PUBLIC RECORD MADE IN  
PERFORMANCE OF DUTY

An entry in any record, official book, or register kept in any of His Majesty's dominions or at sea, or in any foreign country, stating, for the purpose of being referred to by the public, a fact in issue or relevant or deemed to be relevant thereto, is itself deemed to be a relevant fact; provided that the entry was made in proper time by any person in the discharge of any duty imposed upon him by the law of the place in which such record, book, or register is kept, to ascertain the truth of the matter stated and to make an accurate entry thereof.<sup>2</sup>

<sup>1</sup> *R. v. Francklin*, 1731, 17 S.T. at p. 636, *et seq*; *R. v. Sutton*, 1816, 4 M. & S. 532.

<sup>2</sup> *Sturka v. Freccia*, 1880, 5 App. Ca. 623, see especially pp. 622-624

*Illustrations*

(a) An entry in a register of births, deaths, and marriages is by 6 & 7 Will. 4, c. 86 and 37 & 38 Vict. c. 88 *prima facie* evidence of all facts required by Statute to be entered therein. An entry signed by the wife of the birth of a child is *prima facie* evidence of the date as well as the fact of the birth.<sup>1</sup>

(b) A report by a committee appointed by a foreign government to inquire as to the fitness of a certain man to hold a diplomatic position which mentioned the time and place of his birth, is not admissible to prove these facts.<sup>2</sup>

## ARTICLE 36

RELEVANCY OF STATEMENTS IN WORKS OF HISTORY,  
MAPS, CHARTS, AND PLANS

Statements as to matters of general public history made in accredited historical books are deemed to be relevant—

when the occurrence of any such matter is in issue, or is or is deemed to be relevant to the issue; but statements in such works as to private rights or customs are deemed to be irrelevant.<sup>3</sup>

[Submitted] Statements of facts in issue or relevant or deemed to be relevant to the issue made in published maps or charts generally offered for public sale as to matters of public notoriety, such as the relative position of towns and countries, and such as are usually represented or stated in such maps or charts, are themselves

and 643-645. See, too, Wills on Evidence, 2nd ed., Part III, chap. ix. As to the reciprocal recognition of the public registers of a foreign country see 23 Geo. 5, c. 4, and S.R. & O., 1933, No. 383, referring to Belgium. Cf. Article 89, *post*. p. 106.

<sup>1</sup> *Brierly v. Brierly and Williams*, [1918] P. 257.

<sup>2</sup> *Sturia v. Freccia, ubi supra*.

<sup>3</sup> See cases in *Read v. Bishop of Lincoln*, [1892] A.C. 644, at pp. 652-654.

leemed to be relevant facts;<sup>1</sup> but such statements are, irrelevant if they relate to matters of private concern, or matters not likely to be accurately stated in such documents.<sup>2</sup>

### ARTICLE 37

#### ENTRIES IN BANKERS' BOOKS

A copy of any entry in a banker's book must<sup>3</sup> in all legal proceedings be received as *prima facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded [even in favour of a party to a cause producing a copy of an entry in the book of his own bank].<sup>4</sup>

Such copies may be given in evidence only if the conditions laid down for case (6) of Article 75 are complied with.

The expression "Bankers' books" includes ledgers, day-books, cash-books, account-books, and all other books used in the ordinary business of the bank.<sup>5</sup>

The word "Bank" is restricted to banks which have duly made a return to the Commissioners of Inland Revenue,

Savings banks certified under the Act relating to savings banks,

Post-office savings banks, and

<sup>1</sup> In *R. v. Orton*, maps of Australia were given in evidence to show the situation of various places at which the defendant said he had lived. In *R. v. Jameson*, Trial at Bar, July 21st, 1896, standard maps of South Africa were admitted to show the general positions of the places referred to: *Phipson*, 367.

<sup>2</sup> E.g. a line in a tithe commutation map purporting to denote the boundaries of A's property is irrelevant in a question between A and B as to the position of the boundaries: *Wilberforce v. Hearfield*, 1877, 5 Ch.D. 709, and see *Hammond v. Bradstreet*, 1854, 10 Ex. 390; and *R. v. Berger*, [1894] 1 Q.B. 823. See, too, *Phipson*, 367.

<sup>3</sup> Bankers' Books Evidence Act, 1879 (42 Vict. c. 11), ss. 3, 6.

<sup>4</sup> *Harding v. Williams*, 1880, 14 Ch.D. 197.

<sup>5</sup> And applies apparently to the books of bankers in all parts of the United Kingdom: *Kissam v. Link*, [1896] 1 Q.B. 574.

Any company registered under the Companies Act, 1929 (19 & 20 Geo. 5, c. 23), which carries on the business of bankers and which has duly furnished to the registrar of joint-stock companies a list and summary, as required by that Act, with the addition of a statement of the names of the several places where it carries on business.<sup>1</sup>

The fact that any bank has duly made a return to the Commissioners of Inland Revenue may be proved in any legal proceeding by the production of a copy of its return verified by the affidavit of a partner or officer of the bank, or by the production of a copy of a newspaper purporting to contain a copy of such return published by the Commissioners of Inland Revenue.<sup>2</sup>

The fact that any such savings bank is certified under the Act relating to savings banks may be proved by an office or examined copy of its certificate. The fact that any such bank is a post-office savings bank may be proved by a certificate purporting to be under the hand of His Majesty's Postmaster-General or one of the secretaries of the Post Office.<sup>2</sup>

The fact that a company carrying on the business of bankers has duly furnished a list, summary and additional statement (as above) may be proved by the certificate of the registrar or any assistant registrar.<sup>3</sup>

### ARTICLE 38

#### BANKERS NOT COMPELLABLE TO PRODUCE THEIR BOOKS

A bank or officer of a bank is not in any legal proceeding to which the bank is not a party compellable to pro-

<sup>1</sup> 19 & 20 Geo. 5, c. 23, s. 108 and s. 361.

<sup>2</sup> 42 Vict. c. 11, s. 9.

<sup>3</sup> 19 & 20 Geo. 5, c. 23, s. 361 (2).

duce any banker's book, or to appear as a witness to prove the matters, transactions, and accounts therein recorded unless by order of a Judge of the High Court made for special cause<sup>1</sup> [or of a County Court Judge in respect of actions in his own court].

### ARTICLE 39

#### JUDGE'S POWERS AS TO BANKERS' BOOKS

On the application of any party to a legal proceeding a Court or Judge [including a County Court Judge acting in respect to an action in his own court] may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. Such order may be made either with or without summoning the bank, or any other party, and must be served on the bank three clear days [exclusive of Sundays and Bank holidays] before it is to be obeyed, unless the Court otherwise directs.<sup>2</sup>

### ARTICLE 40 \*

#### "JUDGMENT"

The word "judgment" in Articles 41-48 means any final judgment, order, or decree of any Court.

The provisions of Articles 41-46 inclusive are all subject to the provisions of Article 47.

\* See Note IX.

<sup>1</sup> 42 Vict. c. 11, ss. 7, 10.

<sup>2</sup> 42 Vict. c. 11, s. 7. See *Davies v. White*, 1884, 53 L.J. (Q.B.) 275; *In re Marshfield, Marshfield v. Hutchings*, 1886, 32 Ch.D. 499; *Arnott v. Hayes*, 1887, 36 Ch.D. 731. The order may be made in respect of books in any part of the United Kingdom: *Kissam v. Link*, [1896] 1 Q.B. 574. See *post*, Article 75 (2).

## ARTICLE 41

ALL JUDGMENTS CONCLUSIVE PROOF OF THEIR LEGAL  
EFFECT

All judgments whatever are conclusive proof as against all persons of the existence of that state of things which they actually effect when the existence of the state of things so effected is a fact in issue, or is or is deemed to be relevant to the issue. The existence of the judgment effecting it may be proved in the manner prescribed in Part II.

*Illustrations*

(a) The question is, whether A has been damaged by the negligence of his servant B in injuring C's horse.

A judgment in an action, in which C recovered damages against A, is conclusive proof as against B, that C did recover damages against A in that action.<sup>1</sup>

(b) The question is, whether A, a shipowner, is entitled to recover as for a loss by capture against B, an underwriter.

A judgment of a competent French prize court condemning the ship and cargo as prize is conclusive proof that the ship and cargo were lost to A by capture.<sup>2</sup>

(c) The question is, whether A can recover damages from B for a malicious prosecution.

The judgment of a Court by which A was acquitted is conclusive proof that A was acquitted by that Court.<sup>3</sup>

(d) A, as executor to B, sues C for a debt due from C to B.

The grant of probate to A is conclusive proof as against C, that A is B's executor.<sup>4</sup>

(e) A is deprived of his living by the sentence of an ecclesiastical court.

<sup>1</sup> *Green v. New River Company*, 1792, 4 T.R. 589. (See Article 45, Illustration (a).)

<sup>2</sup> Involved in *Geyer v. Aguilar*, 1798, 7 T.R. 681.

<sup>3</sup> *Leggatt v. Tollervey*, 1811, 14 East, 302; and see *Caddy v. Barlow*, 1827, 1 Man. & Ry. 275.

<sup>4</sup> *Allen v. Dundas*, 1789, 3 T.R. 125. In this case the will to which probate had been obtained was forged.

The sentence is conclusive proof of the act of deprivation in all cases.<sup>1</sup>

(f) A and B are divorced *a vinculo matrimonii* by a sentence of the Divorce Court.

The sentence is conclusive proof of the divorce in all cases.<sup>2</sup>

### ARTICLE 42

#### JUDGMENTS CONCLUSIVE AS BETWEEN PARTIES AND PRIVIES OF FACTS FORMING GROUND OF JUDGMENT

Every judgment is conclusive proof as against parties and privies of facts directly in issue in the case, actually decided by the Court, and appearing from the judgment itself to be the ground on which it was based; unless evidence was admitted in the action in which the judgment was delivered which is excluded in the action in which that judgment is intended to be proved.<sup>3</sup>

#### *Illustrations*

(a) The question is, whether C, a pauper, is settled in parish A or parish B.

D is the mother and E the father of C. D, E, and several of their children were removed from A to B before the question as to C's settlement arose, by an order unappealed against, which order described D as the wife of E.

The statement in the order that D was the wife of E is conclusive as between A and B.<sup>4</sup>

(b) A and B each claim administration to the goods of C, deceased.

Administration is granted to B, the judgment declaring

<sup>1</sup> Judgment of Lord Holt in *Philips v. Bury*, 1788, 2 T.R. 346, 351.

<sup>2</sup> Assumed in *Needham v. Bremner*, 1866, L.R. 1 C.P. 583.

<sup>3</sup> *R. v. Hutchins*, 1880, 5 Q.B.D. 353, is a good illustration of this principle. The text was approved in *Woodland v. Woodland*, [1928] P. 169.

<sup>4</sup> *R. v. Hartington Middle Quarter*, 1855, 4 E. & B. 780; and see *Flitters v. Allfrey*, 1874, L.R. 10 C.P. 29; and contrast *Dover v. Child*, 1876, 1 Ex. Div. 172.

that, as far as appears by the evidence, B has proved himself next of kin.

Afterwards there is a suit between A and B for the distribution of the effects of C. The declaration in the first suit is in the second suit conclusive proof as against A that B is nearer of kin to C than A.<sup>1</sup>

(c) A company sues A for unpaid premium and calls. A special case being stated in the Court of Common Pleas, A obtains judgment on the ground that he never was a shareholder.

The company being wound up in the Court of Chancery, A applies for the repayment of the sum he had paid for premium and calls. The decision that he never was a shareholder is conclusive as between him and the company that he never was a shareholder, and he is therefore entitled to recover the sums he paid.<sup>2</sup>

(d) A obtains a decree of judicial separation from her husband B, on the ground of cruelty and desertion, proved by her own evidence.

Afterwards B sues A for dissolution of marriage on the ground of adultery, in which suit neither B nor A can give evidence. A charges B with cruelty and desertion. The decree in the first suit is deemed to be irrelevant in the second.<sup>3</sup>

## ARTICLE 43

### STATEMENTS IN JUDGMENTS IRRELEVANT AS BETWEEN STRANGERS, EXCEPT IN CASES OF STATUS

Statements contained in judgments as to the facts upon which the judgment is based are deemed to be irrelevant as between strangers, or as between a party or privy, and a stranger,<sup>4</sup> except in cases of judgments affecting the legal status of persons or things.<sup>5</sup> In such cases the judg-

<sup>1</sup> *Barrs v. Jackson*, 1845, 1 Phill. 582, 587, 588.

<sup>2</sup> *Bank of Hindustan, etc., Alison's Case*, 1873, L.R. 9 Ch.App. 1, 24.

<sup>3</sup> *Stoate v. Stoate*, 1861, 2 Swa. & Tri. 223. Both would now be competent witnesses in each suit.

<sup>4</sup> *Hollington v. Hewthorn* ([1943] 1 K.B. 587), overruling *Crippen, in the Estate of* ([1911] p. 108), in so far as it decides the contrary.

<sup>5</sup> This refers to so-called judgments *in rem*, e.g. bankruptcy, divorce,

ment is conclusive proof as against all persons of the fact on which it is based, where such fact is plainly stated therein.

*Illustrations*

(a) The question is, whether A committed bigamy by marrying B during the lifetime of her former husband C.

A decree in a suit of jactitation of marriage, forbidding C to claim to be the husband of A, on the ground that he was not her husband, is deemed to be irrelevant.<sup>1</sup>

(b) The question is, whether A, a shipowner, has broken a warranty to B, an underwriter, that the cargo of the ship whose freight was insured by A was neutral property.

The sentence of a French prize court condemning ship and cargo, on the ground that the cargo was enemy's property, is conclusive proof in favour of B that the cargo was enemy's property (though on the facts the Court thought it was not).<sup>2</sup>

ARTICLE 44

EFFECT OF JUDGMENT NOT PLEADED AS AN ESTOPPEL

If a judgment is not pleaded by way of estoppel<sup>3</sup> it is as between parties and privies deemed to be a relevant fact, whenever any matter, which was, or might have been decided in the action in which it was given, is in issue, or is or is deemed to be relevant to the issue, in any subsequent proceeding.

Such a judgment is conclusive proof of the facts which it decides, or might have decided, if the party who gives evidence of it had no opportunity of pleading it as an estoppel.

and prize; and see notes on the *Duchess of Kingston's Case*, 1776, 2 S.L.C. 657 ff.; and *Castrique v. Inrie*, 1870, L.R. 4 E. & I. App. 414 at pp. 434-435.

<sup>1</sup> *Duchess of Kingston's Case*, 1776, 2 S.L.C. 644.

<sup>2</sup> *Geyer v. Aguilar*, 1798, 7 T.R. 681.

<sup>3</sup> By modern practice estoppel and *res judicata* must be pleaded (R.S.C. O. xix, rt. 4, 6, and 15), and a party omitting to plead them may be shut out from giving evidence thereof.

*Illustrations*

(a) A sues B for deepening the channel of a stream, whereby the flow of water to A's mill was diminished.

A verdict recovered by B in a previous action for substantially the same cause, and which might have been pleaded as an estoppel, is deemed to be relevant, but not conclusive in B's favour.<sup>1</sup>

(b) A sues B for breaking and entering A's land, and building thereon a wall and a cornice. B pleads that the land was his, and obtains a verdict in his favour on that plea.

Afterwards B's devisee sues A's wife (who on the trial admitted that she claimed through A) for pulling down the wall and cornice. As the first judgment could not be pleaded as an estoppel (the wife's right not appearing on the pleadings), it is conclusive in B's favour that the land was his.<sup>2</sup>

## ARTICLE 45

JUDGMENTS GENERALLY DEEMED TO BE IRRELEVANT  
AS BETWEEN STRANGERS

Judgments are not deemed to be relevant as rendering probable facts which may be inferred from their existence, but which they neither state nor decide—

as between strangers;

as between parties and privies in suits where the issue is different even though they relate to the same occurrence or subject-matter;

or in favour of strangers against parties or privies.

But a judgment is deemed to be relevant as between strangers:

(1) if it is an admission, or

(2) if it relates to a matter of public or general interest, so as to be a statement under Article 31.

<sup>1</sup> *Vooght v. Winch*, 1819, 2 B. & Ald. 662; and see *Feversham v. Emerson*, 1855, 11 Ex. 391.

<sup>2</sup> *Whittaker v. Jackson*, 1864, 2 H. & C. at p. 926. This had previously been doubted. See 2 *Pl. Ev.* 24, n. 4.

*Illustrations*

(a) The question is, whether A has sustained loss by the negligence of B, his servant, who has injured C's horse.

A judgment recovered by C against A for the injury, though conclusive as against B, as to the fact that C recovered a sum of money from A, is deemed to be irrelevant to the question, whether this was caused by B's negligence.<sup>1</sup>

(b) The question whether a bill of exchange is forged arises in an action on the bill. The fact that A was convicted of forging the bill is deemed to be irrelevant.<sup>2</sup>

(c) A collision takes place between two ships, A and B, each of which is damaged by the other.

The owner of A sues the owner of B, and recovers damages on the ground that the collision was the fault of B's captain. This judgment is not conclusive in an action by the owner of B against the owner of A, for the damage done to B.<sup>3</sup> [*Sembler*, it is deemed to be irrelevant.]<sup>4</sup>

(d) A is prosecuted and convicted as a principal felon.

B is afterwards prosecuted as an accessory to the felony committed by A.

The judgment against A is deemed to be irrelevant as against B, though A's guilt must be proved as against B.<sup>5</sup>

(e) A sues B, a carrier, for goods delivered by A to B.

A judgment recovered by B against a person to whom he had delivered the goods is deemed to be relevant as an admission by B that he had them.<sup>6</sup>

(f) A sues B for trespass on land.

A judgment, convicting A for a nuisance by obstructing

<sup>1</sup> *Green v. New River Company*, 1792, 4 T.R. 589. (See Article 41, Illustration (a).)

<sup>2</sup> Per Blackburn, J., in *Castrique v. Inrie*, 1870, L.R. 4 E. & I. App. at p. 434. See *Crippen, In the estate of*, [1911] P. 108, where Evans, P., in dealing with a motion for a grant of administration to the estate of a deceased woman, admitted a certified copy of the conviction of her husband for murdering her as presumptive evidence of the commission of the crime. This decision does not affect the text of Article 45 as the conviction stated and decided the guilt of the accused.

<sup>3</sup> *The Calypso*, 1856, Swab. Ad. 28.

<sup>4</sup> On the general principle in *Duchess of Kingston's Case*, 1776, 2 Smith's L.C. 644.

<sup>5</sup> *Sembler* from *R. v. Turner*, 1832, 1 Moo. C.C. 347.

<sup>6</sup> *Tiley v. Cowling*, 1701, Buller, N.P. 242 b; 1 Ld. Raymd. 744.

a highway on the place said to have been trespassed on is [at least] deemed to be relevant to the question, whether the place was a public highway [and is possibly conclusive].<sup>1</sup>

### ARTICLE 46

#### JUDGMENTS CONCLUSIVE IN FAVOUR OF JUDGE

When any action is brought against any person for anything done by him in a judicial capacity, the judgment delivered, and the proceedings antecedent thereto, are conclusive proof of the facts therein stated, whether they are or are not necessary to give the defendant jurisdiction, if, assuming them to be true, they show that he had jurisdiction.

#### *Illustration*

A sues B (a justice of the peace) for taking from him a vessel and 500 lbs. of gunpowder thereon. B produces a conviction before himself of A for having gunpowder in a boat on the Thames (against 2 Geo. 3, c. 28).

The conviction is conclusive proof for B, that the thing called a boat was a boat.<sup>2</sup>

### ARTICLE 47

#### FRAUD, COLLUSION, OR WANT OF JURISDICTION MAY BE PROVED

Whenever any judgment is offered as evidence under any of the articles hereinbefore contained, the party against whom it is so offered may prove that the Court which gave it had no jurisdiction, or that it has been reversed, or, if he is a stranger to it, that it was obtained

<sup>1</sup> *Petrie v. Nullall*, 1856, 11 Ex. 569.

<sup>2</sup> *Brillat v. Kinnaid*, 1819, 1 Brod. & Bing. 432.

by any fraud or collusion, to which neither he nor any person to whom he is privy was a party.<sup>1</sup>

If an action is brought in an English Court to enforce the judgment of a foreign Court, and [probably] if an action is brought in an English Court to enforce the judgment of another English Court, any such matter as aforesaid may be proved by the defendant, even if the matter alleged as fraud was alleged by way of defence in the foreign Court and was not believed by them to exist.<sup>2</sup>

## ARTICLE 48

### FOREIGN JUDGMENTS

The provisions of Articles 41-47 apply to such of the judgments of Courts of foreign countries as can by law be enforced in this country, and so far as they can be so enforced.<sup>3</sup>

<sup>1</sup> Cases collected in *Taylor*, ss. 1715, 1716, 1721. See, too, *Ochsenbein v. Papelier*, 1873, 8 Ch.App. 695.

<sup>2</sup> *Aboulaff v. Oppenheimer*, 1882, 10 Q.B.D. 295. As to setting aside registered judgments of foreign Courts, see *Foreign Judgments, etc.*, Act 1933 (23 Geo. 5, c. 13), ss. 4 and 5. See *Papadoulos v. Papadoulos*, [1930] 2 P. 55, where a decree of nullity made without jurisdiction by an inferior Court in Cyprus did not estop a wife from proceeding under the Summary Jurisdiction (Married Women) Acts in England.

<sup>3</sup> See the *Foreign Judgments (Reciprocal Enforcement) Act*, *ubi supra*. The cases on this subject are collected in the note on the *Duchess of Kingston's Case*, 2 *Smith's L.C.* 702-754. A list of the cases will be found in *Roscoe*, 210-12. The last leading cases on the subject are *Godard v. Gray*, L.R. 6 Q.B. 139, and *Castrique v. Inrie*, 1870, L.R. 4 H.L. 414. See, too, *Schisby v. Westenholz*, 1870, L.R. 6 Q.B. 155; *Rousillon v. Rousillon*, 1880, 14 Ch.D. at p. 370; *Nouvon v. Freeman*, 1889, 15 App. Ca. 1; and *Sirdar Gurdyal Singh v. Faridkote*, [1894] A.C. 670. As to proving such judgments see s. 3 (1) (b) of the above Act, giving power to make rules for the purpose. See also Article 88, *post*, p. 104.

## CHAPTER V

### *OPINIONS, WHEN RELEVANT AND WHEN NOT*

#### ARTICLE 49

##### OPINION GENERALLY IRRELEVANT

THE fact that any person is of opinion that a fact in issue, or relevant or deemed to be relevant to the issue, does or does not exist is deemed to be irrelevant to the existence of such fact, except in the cases specified in this chapter.<sup>1</sup>

##### *Illustration*

The question is, whether A, a deceased testator, was sane or not when he made his will. His friends' opinions as to his sanity, as expressed by the letters which they addressed to him in his lifetime, are deemed to be irrelevant.<sup>2</sup>

#### ARTICLE 50

##### OPINIONS OF EXPERTS ON POINTS OF SCIENCE OR ART

Where there is a question as to any point of science or art, the opinions upon that point of persons specially skilled in any such matter, hereinafter called experts, are deemed to be relevant facts.

The words "science or art" include all subjects on which

<sup>1</sup> See Taylor, ss. 1416-1425; Best, ss. 511-517; Phipson, 382-403; Roscoe, 175-176; Halsbury, xiii. pp. 600-609; and *Wright v. Doe d. Tatham*, 1837, 7 A. & E. 313; *Hollington v. Hawthorn*, [1943] 1 K.B. 587, C.A. See also Append. A pp. 238-240.

<sup>2</sup> *Wright v. Doe d. Tatham*, 1837, 7 A. & E. 313.

a course of special study or experience is necessary to the formation of an opinion,<sup>1</sup> and include—

- (1) handwriting;<sup>2</sup>
- (2) the state of an art at any given time, and the meaning of any technical term used in connection therewith;
- (3) whether any particular operation in connection with an art could be carried out;
- (4) generally any explanation required as to facts of a scientific kind.

The words "science and art" do not include:

- (1) the meaning of a specification in a patent case;
- (2) the fact that a given step or alteration in the development of a manufacturing process is obvious.<sup>3</sup>

When there is a question as to foreign law, the opinions of experts who in their profession are acquainted with such law are the only admissible evidence thereof, though such experts may produce to the Court books which they declare to be works of authority upon the foreign law in question, which books the Court, having received all necessary explanations from the expert, may construe for itself.<sup>4</sup> Any question as to the effect of the evidence given with respect to foreign law shall, instead of being submitted to the jury, be decided by the judge alone.<sup>5</sup>

It is the duty of the judge to decide, subject to the

<sup>1</sup> Notes to *Carter v. Bochm*, 1776, 1 Sm.L.C. 546.

<sup>2</sup> The Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18) s. 8.

<sup>3</sup> *British Celanese Ltd. v. Courtauld's Ltd.*, 1935, 152 L.T. 537 at p. 543, per Lord Tomlin in the House of Lords.

<sup>4</sup> *Baron de Bode's Case*, 1845, 8 Q.B. 266; *Di Sora v. Phillips*, 1863, 10 H.L. Ca. 624; *Castrique v. Inrie*, 1870, L.R. 4 H.L. at p. 434; *Picton's Case*, 1806, 30 S.T. 510 *et seq.*

<sup>5</sup> Supreme Court of Judicature Act, 1925 (15 & 16 Geo. 5, c. 49), s. 102; and see *Lazard Bros. v. Midland Bank*, [1933] A.C. 289. The section applies to criminal cases; *R. v. Hammer*, [1923] 2 K.B. 786.

opinion of the Court above, whether the skill of any person in the matter on which evidence of his opinion is offered is sufficient to entitle him to be considered as an expert.<sup>1</sup>

The opinion of an expert as to the existence of the facts on which his opinion is to be given is irrelevant, unless he perceived them himself.<sup>2</sup>

### *Illustrations*

(a) The question is, whether the death of A was caused by poison.

The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died are deemed to be relevant.<sup>3</sup>

(b) The question is, whether A at the time of doing a certain act was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are deemed to be relevant.<sup>4</sup>

(c) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons are deemed to be relevant.<sup>5</sup>

(d) The opinions of experts on the questions, whether in

<sup>1</sup> *Bristow v. Sequeville*, 1850, 6 Ex. 275; *Rowley v. L. & N.W. Railway*, 1873, L.R. 8 Ex. 221. *In the Goods of Bonelli*, 1875, L.R. 1 P.D. 69; and see *In the Goods of Dost Aly Khan*, 1880, L.R. 6 P.D. 6.

<sup>2</sup> Taylor, s. 1421.

<sup>3</sup> *R. v. Palmer*, 1856, *passim*. See my *Hist. Crim. Law*, iii. 389.

<sup>4</sup> *R. v. Dove*, 1856, *passim*. *Hist. Crim. Law*, iii. 426.

<sup>5</sup> *Criminal Procedure Act*, 1865 (28 & 29 Vict. c. 18), s. 8.

illustration (a) A's death was in fact attended by certain symptoms, whether in illustration (b) the symptoms from which they infer that A was of unsound mind existed, whether in illustration (c) either or both of the documents were written by A, are deemed to be irrelevant.

## ARTICLE 51

### FACTS BEARING UPON OPINIONS OF EXPERTS<sup>1</sup>

Facts, not otherwise relevant, have in some cases been permitted to be proved, as supporting or being inconsistent with the opinions of experts

#### *Illustrations*

(a) The question was whether A was poisoned by a certain poison

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms alleged to be the symptoms of that poison, were deemed to be relevant<sup>2</sup>

(b) The question is, whether an obstruction to a harbour is caused by a certain bank. An expert gives his opinion that it is not

The fact that other harbours similarly situated in other respects, but where there were no such banks,<sup>3</sup> began to be obstructed at about the same time, is deemed to be relevant

<sup>1</sup> I have altered the wording of this article, so as to make it less absolute than it was in earlier editions. The admission of such evidence is rare and exceptional, and must obviously be kept within narrow limits. At the time of Palmer's trial only two or three cases of poisoning by strychnine had occurred.

<sup>2</sup> *R v Palmer*, 1856, printed trial, p 124, etc., *Hist Crim Law*, iii 389. In this case evidence was given of the symptoms attending the deaths of Agnes Senet, poisoned by strychnine in 1845, Mrs Serjeantson Smith, similarly poisoned in 1848, and Mrs Dove, murdered by the same poison subsequently to the death of Cook, for whose murder Palmer was tried.

<sup>3</sup> *Folkes v Chadd*, 1782, 3 Doug 157

## ARTICLE 52

## OPINION AS TO HANDWRITING, WHEN DEEMED TO BE RELEVANT

When there is a question as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the supposed writer that it was or was not written or signed by him, is deemed to be a relevant fact.

A person is deemed to be acquainted with the handwriting of another person when he has at any time seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.<sup>1</sup>

*Illustration*

The question is, whether a given letter is in the handwriting of A, a merchant in Calcutta.

B is a merchant in London, who has written letters addressed to A, and received in answer letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence. D is B's broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon.

The opinions of B, C, and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C, nor D ever saw A write.<sup>2</sup>

The opinion of E, who saw A write once twenty years ago, is also relevant.<sup>3</sup>

<sup>1</sup> See Illustration. Cf : Article 72, *post*.

<sup>2</sup> *Doe v. Sukermore*, 1836, 5 A. & E. 705 (Coleridge, J.); 730 (Patteson, J.); 739-740 (Denman, C.J.).

<sup>3</sup> *R. v. Horne Tooke*, 1794, 25 S.T. 71-72.

## ARTICLE 53

## COMPARISON OF HANDWRITINGS

Comparison of a disputed handwriting with any writing proved to the satisfaction of the judge to be genuine is permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute. This paragraph applies to all courts of judicature, criminal or civil, and to all persons having by law, or by consent of parties, authority to hear, receive, and examine evidence.<sup>1</sup>

## ARTICLE 54

OPINION AS TO EXISTENCE OF MARRIAGE, WHEN  
RELEVANT

When there is a question whether two persons are or are not married, the facts that they cohabited and were treated by others as man and wife are deemed to be relevant facts, and to raise a presumption that they were lawfully married, and that any act necessary to the validity of any form of marriage which may have passed between them was done; but such facts are not sufficient to prove a marriage in a prosecution for bigamy or in pro-

<sup>1</sup> 28 & 29 Vict. c. 18, s. 8, re-enacting 17 & 18 Vict. c. 125, s. 25, now repealed. See *R. v. Silverlock*, [1894] 2 Q.B. 766, where it was held that the solicitor for the prosecution was a proper witness to compare handwriting proved to be that of the prisoner with that in which documents produced by the prosecution were written. It seems to be the case that such a witness must be "skilled" or, as Lord Russell said, "peritus"; but he need not "have become peritus in the way of his business or in any definite way"; *vulgo*, he need not be a professional expert.

ceedings for a divorce, or in a petition for damages against an adulterer.<sup>1</sup>

### ARTICLE 55

#### GROUNDS OF OPINION, WHEN DEEMED TO BE RELEVANT

Whenever the opinion of any living person is deemed to be relevant, the grounds on which such opinion is based are also deemed to be relevant.

#### *Illustration*

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

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<sup>1</sup> *Morris v. Miller*, 1767, 4 Bull. 2057, *Birt v. Barlow*, 1779, 1 Doug. 170; and see *Catherwood v. Caslon*, 1844, 13 M. & W. 261; *Compare R. v. Mainwaring*, 1856, *Dean & B.* 132. See, too, *R. v. Wilson*, 1862, 3 F. & F. 119; *De Thoren v. A. G.*, 1876, 1 App. Cas. 686, *Piers v. Piers*, 1849, 2 H. L. Ca. 331. Some of the references in the report of *De Thoren v. A. G.* are incorrect.

The principle underlying this Article has much in common with Articles 109 (lost grant) and 110 (due appointment to office, etc.) but is wider in this respect, that besides the conduct of the parties themselves the attitude of others towards them is taken into account, that is to say, the reputation they enjoy of being duly married.

## CHAPTER VI \*

### *CHARACTER, WHEN DEEMED TO BE RELEVANT AND WHEN NOT<sup>1</sup>*

#### ARTICLE 56

##### CHARACTER GENERALLY IRRELEVANT

THE fact that a person is of a particular character is deemed to be irrelevant<sup>2</sup> to any inquiry respecting his conduct, except in the cases mentioned in this chapter.

#### ARTICLE 57

##### EVIDENCE OF CHARACTER IN CRIMINAL CASES BY WITNESSES OTHER THAN THE ACCUSED

In criminal cases, the fact that the person accused has a good character is deemed to be relevant; but the fact that he has a bad character is deemed to be irrelevant, unless it is itself a fact in issue, or unless evidence has been given that he has a good character, in which case evidence that he has a bad character is admissible.<sup>3</sup>

\* See Note X.

<sup>1</sup> See Article 59 as to the meaning of the word Character.

<sup>2</sup> This salutary rule has unfortunately been infringed by the decision in *R. v. Frank Sheridan*, [1937] 1 K.B. 223.

<sup>3</sup> If the prisoner does not put his character in issue, no questions may be asked tending to show that he has been previously convicted, *R. v. McCraig*, 1925, 19 Cr. App. Rep. 68. Witnesses called by the prisoner, to give him a good character, may be cross-examined about his previous convictions, *R. v. Hodgkiss*, 1836, 7 C. & P. 298. In no case under this Article can evidence in chief be given of the prisoner's previous convictions except where they are charged in the indictment. See p. 202.

When any person who—

being on his trial for any felony not punishable with death, is also charged with a previous conviction of felony;<sup>1</sup>

or who—

being on his trial for any offence under the Larceny Act, 1861, is also charged with a previous conviction for any felony, misdemeanour, or offence punishable upon summary conviction;<sup>2</sup>

or who—

being on his trial for any offence against the Coinage Offences Act, 1861, or any former Act relating to the coin, is also charged with a previous conviction for any offence under any such Act;<sup>3</sup>

adduces evidence of his good character other than his own testimony, then, in any such case, the prosecutor may, in answer to such evidence of good character, give evidence of any such previous conviction before the jury return their verdict for the offence for which the offender is being tried.<sup>4</sup>

## ARTICLE 58

### EVIDENCE OF CHARACTER IN CRIMINAL CASES BY THE ACCUSED<sup>5</sup>

A person charged with an offence and called as a witness in pursuance of the Criminal Evidence Act, 1898,

<sup>1</sup> 6 & 7 Will. 4, c. 111, referring to 7 & 8 Geo. 4, c. 28, s. 11.

<sup>2</sup> 24 & 25 Vict. c. 96, s. 116.

<sup>3</sup> 24 & 25 Vict. c. 99, s. 37.

<sup>4</sup> See the appropriate sections of the Acts referred to which impose a heavier penalty after previous convictions.

<sup>5</sup> 61 & 62 Vict. c. 36, s. 1 (f). These rules are applicable to a person who is a competent witness on his own behalf under this Act; the Act applies to all criminal cases and courts; *Charnock v. Merchant*, [1900] 1 Q.B. 474. See p. 143, n.

may not be asked, and if asked may not be required to answer, any question tending to show that he has committed, or been convicted of, or been charged with any offence other than that whereof he is then charged,

or is of bad character, unless<sup>1</sup>—

- (1) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged;<sup>2</sup> or
- (2) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character; or has given evidence of his own good character;<sup>3</sup> or the nature or conduct of the defence is such as to involve imputations on the character<sup>4</sup> of the prosecutor, or the witnesses for the prosecution; or
- (3) he has given evidence against any other person charged with the same offence.

A mere contradiction of evidence for the prosecution, even though expressed in abusive terms, is not necessarily an imputation within the meaning of (2).<sup>5</sup>

<sup>1</sup> The prisoner may not be asked if he has been charged with and acquitted of an offence, *Maxwell v. Director of Public Prosecutions*, [1935] A.C. 309. The words "charged with" mean formally charged in a criminal court and not merely accused or questioned, if no proceedings result (*Stirland v. D.P.P.*, [1944] A.C. 315). Questions may relate, subject to Article 129, to offences committed since the one charged; *R. v. Wood*, [1920] 2 K.B. 183.

<sup>2</sup> See Article 12 (guilty knowledge) and Article 13 (system).

<sup>3</sup> Article 143 (dealing with cross-examination as to character), Exception (1) (permitting a witness's previous convictions to be proved against him) presumably applies to cases under (2) of this Article as though the person charged were an ordinary witness; similarly with regard to Article 143, Exception (2) (proof of facts showing bias).

<sup>4</sup> In *R. v. Dunkley*, [1927] 1 K.B. 323, it was laid down that the meaning of the word "character" as here used, is not governed by the decision in *R. v. Rowton*, see Article 59, n., and Note X p. 201.

<sup>5</sup> *R. v. Rouse & Burrell*, [1904] 1 K.B. 184.

## ARTICLE 59

## MEANING OF CHARACTER

In Articles 57 and 58 the word "character" means reputation as distinguished from disposition, and except as previously mentioned in those Articles, evidence may be given only of general reputation, and not of particular acts by which reputation or disposition is shown.<sup>1</sup>

## ARTICLE 60

## CHARACTER AS AFFECTING DAMAGES

In civil cases, the fact that a person's general reputation is bad, may [*it seems*] be given in evidence in reduction of damages; but evidence of rumours that his reputation was bad, and evidence of particular facts showing that his disposition was bad, cannot be given in evidence.<sup>2</sup>

In actions for libel and slander in which the defendant does not by his defence assert the truth of the statement complained of, the defendant is not entitled on the trial to give evidence in chief with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence.<sup>3</sup>

<sup>1</sup> *R. v. Rowton*, 1865, L. & C. 520; *R. v. Tunberfield*, 1864, L. & C. 495, is a case in which the character of a prisoner became incidentally relevant to a certain limited extent. See Note X, p. 201.

<sup>2</sup> *Scott v. Sampson*, 1882, 8 Q.B.D. 491, in which all the older cases are minutely examined in the judgment of Cave, J.

<sup>3</sup> R.S.C. O. xxxvi, r. 37.



PART II  
ON PROOF



## CHAPTER VII

### *FACTS PROVED OTHERWISE THAN BY EVIDENCE—JUDICIAL NOTICE*

#### ARTICLE 61 \*

##### OF WHAT FACTS THE COURT TAKES JUDICIAL NOTICE

It is the duty of all judges to take judicial notice of the following facts:

(1) All unwritten laws, rules, and principles having the force of law administered by any Court sitting under the authority of His Majesty and his successors in England or Ireland, whatever may be the nature of the jurisdiction thereof.<sup>1</sup>

(2) All public Acts of Parliament,<sup>1</sup> and all Acts of Parliament whatever, passed since February 4th, 1851, unless the contrary is expressly provided in any such Act.<sup>2</sup>

(3) The general course of proceeding and privileges of Parliament and of each House thereof, and the date and place of their sittings, but not transactions in their journals.<sup>3</sup>

(4) All general customs, rules and principles which have been held to have the force of law in any division of the High Court of Justice or by any of the superior courts of law or equity, and all customs which have been duly

\* See Note XI.

<sup>1</sup> Taylor, s. 5; and see 15 & 16 Geo. 5, c. 49 (Supreme Court of Judicature (Consolidation) Act, 1925), s. 42.

<sup>2</sup> 52 & 53 Vict. c. 63 (The Interpretation Act, 1889), s. 9.

<sup>3</sup> Taylor, s. 5; but see 8 & 9 Vict. c. 113, s. 3, as to journals of the Houses of Parliament.

certified to and recorded in any such Court.<sup>1</sup>

(5) The course of proceeding and all rules of practice in force in the Supreme Court of Justice. Courts of a limited or inferior jurisdiction take judicial notice of their own course of procedure and rules of practice, but not of those of other Courts of the same kind, nor does the Supreme Court of Justice take judicial notice of the course of procedure and rules of practice of such Courts except in so far as they are governed by statute or statutory rules.<sup>2</sup>

(6) The accession and [semble] the sign manual of His Majesty and his successors.<sup>3</sup>

(7) The existence and title of every State and Sovereign recognised by His Majesty and his successors.<sup>4</sup>

(8) The accession to office, names, titles, functions, and, when attached to any decree, order, certificate, or other judicial or official documents, the signatures of all the judges of the Supreme Court of Justice.<sup>5</sup>

(9) The Great Seal, the Privy Seal, the seals of the Superior Courts of Justice,<sup>6</sup> and all seals which any Court

<sup>1</sup> The old rule was that each Court took notice of customs held by or certified to it to have the force of law. It is submitted that the effect of the Judicature Act, which fuses all the Courts together, must be to produce the result stated in the text. As to the old law see *Piper v. Chappell*, 1845, 14 M. & W. 649-650. *Ex parte Powell, In re Matthews*, 1875, 1 Ch.D. 505-507, contains some remarks by Lord Justice Mellish as to proving customs till they come by degrees to be judicially noticed.

<sup>2</sup> Taylor, s. 20.

<sup>3</sup> Taylor, ss. 18, 14.

<sup>4</sup> Taylor, s. 4, and see *Duff Development v. State of Kelantan*, [1924] A.C. 797, and *Aks. etc. Luther v. Sagor*, [1921] 3 K.B. 532 (C.A.).

<sup>5</sup> Taylor, s. 14; and as to latter part, 8 & 9 Vict. c. 113, s. 2, as modified by 15 & 16 Geo. 5, c. 49 (The Supreme Court of Judicature Act, 1925). S. 99 (1) of that Act authorises the making of Rules for regulating the means by which particular facts may be proved, and the mode by which evidence thereof may be given, and s. 101 preserves the mode of giving evidence by the oral examination of witnesses in trials with a jury. See, too, O. xxxvii. Many statutes contain provisions that a specified official certificate shall be evidence of a particular fact.

<sup>6</sup> The Judicature Acts confer no seal on the Supreme or High Court, but see the Supreme Court of Judicature Act, 1925 (15 & 16 Geo. 5 c. 49),

is authorised to use by any Act of Parliament,<sup>1</sup> certain other seals mentioned in Acts of Parliament,<sup>2</sup> the seal of the Corporation of London, and the seal of any notary public in the King's dominions.<sup>3</sup>

(10) The extent of the territories under the dominion of His Majesty and his successors; the territorial and political divisions of England and Northern Ireland, but not their geographical position or the situation of particular places; the commencement, continuance, and termination of war between His Majesty and any other Sovereign; and all other public matters directly concerning the general government of His Majesty's dominions.<sup>4</sup>

(11) The ordinary course of nature,<sup>5</sup> natural and artificial divisions of time, the meaning of English words.

(12) All other matters which they are directed by any statute to notice.

## ARTICLE 62

### AS TO PROOF OF SUCH FACTS

No evidence of any fact of which the Court will take judicial notice need be given by the party alleging its

s. 174, as to Probate matters and s. 200 as to matrimonial causes. As to Land Registration, see 15 Geo. 5, c. 21, s. 126 (7).

<sup>1</sup> *Doe v. Edwards*, 1839, 9 A. & E. 555. See a list in Taylor, s. 6.

<sup>2</sup> Taylor, s. 6.

<sup>3</sup> *Cole v. Sherard*, 1855, 11 Ex. 482. As to foreign notaries, see *Earl's Trust*, 1858, 4 K. & J. 300.

<sup>4</sup> Taylor, s. 17. As to the existence and limits of foreign states, see *Foster v. Globe Venture Syndicate*, 1900, 1 Ch. 811. See also *re a Petition of Right*, [1915] 3 K.B. 649 (C.A.) dealing with judicial notice of a state of war, Zeppelin attacks, and bombardment of the S.E. coast, but cf. *Commonwealth Shipping, etc. v. P. & O.*, [1923] A.C. 191, per Lord Cave, L.C. at p. 197.

<sup>5</sup> Taylor, s. 16. A judge has taken judicial notice of the fact that monkeys have mischievous habits, *May v. Burdett*, 1846, 9 Q.B. 101. In *Clinton v. Lyons*, [1912] 3 K.B. 198 and *Turner v. Coates*, [1917] 1 K.B. 670, the habits of a cat and a colt and were treated as a matter for evidence. The dividing line is obscure.

existence; but the judge, upon being called upon to take judicial notice thereof, may, if he is unacquainted with such fact, refer to any person or to any document or book of reference for his satisfaction in relation thereto, or may refuse to take judicial notice thereof unless and until the party calling upon him to take such notice produces any such document or book of reference.<sup>1</sup>

### ARTICLE 63

#### EVIDENCE NEED NOT BE GIVEN OF FACTS ADMITTED

No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which they have admitted before the hearing and with reference thereto, or by their pleadings.<sup>2</sup> Provided that, in criminal<sup>3</sup> cases the accused can make no admissions, either before or at the trial, so as to dispense with proof.<sup>4</sup>

<sup>1</sup> Taylor (from Greenleaf), s. 21. E.g. a judge will refer in case of need to an almanac, or to a printed copy of the statutes, or write to the Foreign Office, to know whether a State has been recognised.

<sup>2</sup> R.S.C. O. xxxii. The fact that a document is admitted does not make it relevant and is not equivalent to putting it in evidence, per James, L.J., in *Watson v. Rodwell*, 1878, 11 Ch.D. at p. 150.

<sup>3</sup> As to cases of misdemeanour see *R. v. Thornhill*, 1838, 8 C. & P. 575, and the ruling of Darling, J., in *R. v. Stevens & Sumner*, 1909, *Centr. Crim. Court Sessions Papers*, vol. 151, p. 179, at p. 182, cited in Phipson, 19; Roscoe, *Crim. Ev.*, 2 and Wills, 171. As to cases of felony see *R. v. Bateman*, 1845, 1 Cox C.C. 186. There are dicta in old cases in favour of and against allowing admissions in misdemeanours at the trial, but no actual authority. The subject has lost some of its importance since the passing of the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), especially the proviso to s. 4 (1).

<sup>4</sup> Such proof may, of course, consist of or include a confession (Art. 22). On a plea of guilty there is no issue to be tried and proof can be dispensed with.

## CHAPTER VIII *OF ORAL EVIDENCE*

### ARTICLE 64

#### PROOF OF FACTS BY ORAL EVIDENCE

ALL facts may be proved by oral evidence subject to the provisions of Article 97.

### ARTICLE 65 \*

#### ORAL EVIDENCE MUST BE DIRECT

Oral evidence must, in all cases whatever be direct; that is to say—

if it refers to a fact alleged to have been seen, it must be the evidence of a witness who says he saw it;

if it refers to a fact alleged to have been heard, it must be the evidence of a witness who says he heard it;

if it refers to a fact alleged to have been perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

if it refers to an opinion, or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

\* See Note XII.

## CHAPTER IX

### OF DOCUMENTARY EVIDENCE — PRIMARY AND SECONDARY, AND ATTESTED DOCUMENTS

#### ARTICLE 66

##### PROOF OF CONTENTS OF DOCUMENTS

THE contents of documents may be proved either by primary or by secondary evidence.

#### ARTICLE 67

##### PRIMARY EVIDENCE

Primary evidence means the document itself produced for the inspection of the Court, accompanied by evidence to show that it was made by the person alleged to have made it, and by the production of an attesting witness in cases in which an attesting witness must be called under the provisions of Article 69; or by an admission of its contents proved to have been made by a person whose admissions are relevant under Articles 16-20.<sup>1</sup>

Where a document is executed in several parts, each part is primary evidence of the document.

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.<sup>2</sup>

Where a number of documents are all made by print-

<sup>1</sup> *Slatterie v. Pooley*, 1840, 6 M. & W. 664.

<sup>2</sup> *Roe d. West v. Davis*, 1806, 7 Ea. 363.

ing, lithography, or photography, or any other process of such a nature as in itself to secure uniformity in the copies, each is primary evidence of the contents of the rest: <sup>1</sup> but where they are all copies of a common original, no one of them is primary evidence of the contents of the original.<sup>2</sup>

### ARTICLE 68

#### PROOF OF DOCUMENTS BY PRIMARY EVIDENCE

The contents of documents must, except in the cases mentioned in Article 75, be proved by primary evidence: and in the cases mentioned in Article 69 by calling an attesting witness.

### ARTICLE 69 \*

#### PROOF OF WILL OR OTHER TESTAMENTARY DOCUMENT<sup>3</sup>

A will or other testamentary document requiring by law to be attested, may not be used as evidence (except in the cases mentioned or referred to in Article 70) if there be an attesting witness alive, sane, and subject to the process of the Court, until one attesting witness at least has been called for the purpose of proving its execution.

If it be shown that no such attesting witness is alive or

\* See Note XIII.

<sup>1</sup> *R. v. Wilson*, 1817, 2 Star. 129. This case was decided long before the invention of photography; but the judgments delivered by the Court (Ellenborough, C. J., and Abbott, Bayley, and Holroyd, J.J.) establish the principle stated in the text.

<sup>2</sup> *Nadin v. Murray*, 1812, 3 Camp. 228.

<sup>3</sup> For the statutory requirements for the execution of a valid will see the Wills Act, 1837 (1 Vict. c. 26). Wills and testamentary documents are still governed by the old law as to attesting witnesses being specially excepted by the Evidence Act, 1938 (1 & 2 Geo. 6, c. 28, s. 3). It will be appreciated that this only applies to Probate in solemn form or other proof in a contested matter. Probate in common form is far less rigorous.

can be found, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

The rule extends to cases in which—

the document has been burnt<sup>1</sup> or cancelled;<sup>2</sup>

the subscribing witness is blind;<sup>3</sup>

the person by whom the document was executed is prepared to testify to his own execution of it;<sup>4</sup>

the person seeking to prove the document is prepared to prove an admission of its execution by the person who executed it, even if he is a party to the cause,<sup>5</sup> unless such admission be made for the purpose of, or has reference to, the cause.

### ARTICLE 69A

#### PROOF OF DOCUMENTS REQUIRING BY LAW TO BE ATTESTED OTHER THAN WILLS

Any document to the validity of which attestation is requisite (not being a will or other testamentary document) may (notwithstanding that an attesting witness may be alive, sane and subject to the process of the Court) be proved, at the option<sup>6</sup> of the party tendering the same, either by calling such attesting witness to prove its execution, or in the manner provided in Article 69 for the case where no attesting witness is alive or can be found.

<sup>1</sup> *Gillies v. Smither*, 1819, 2 Star. R. 528.

<sup>2</sup> *Bretton v. Cope*, 1791, Pea. R. 43.

<sup>3</sup> *Cronk v. Frith*, 1839, 9 C. & P. 197.

<sup>4</sup> *R. v. Harringworth*, 1815, 4 M. & S. at p. 353.

<sup>5</sup> *Call v. Dunning*, 1803, 4 Ea. 53. See, too, *Whyman v. Ganth*, 1853, 8 Ex. 803; *Randall v. Lynch*, 1810, 2 Camp. 357.

<sup>6</sup> Evidence Act, 1938, s. 3.

## ARTICLE 70

CASES IN WHICH ATTESTING WITNESS NEED NOT BE  
CALLED<sup>1</sup>

In the following cases, and in the case mentioned in Article 73, but in no others, a person seeking to prove the execution of a document required by law to be attested is not bound for that purpose either to call the party who executed the deed or any attesting witness, or to prove the handwriting of any such party or attesting witness—

(1) When he is entitled to give secondary evidence of the contents of the document under Article 75 (1);<sup>2</sup>

(2) When his opponent produces it when called upon and claims an interest under it in reference to the subject-matter of the suit;<sup>3</sup>

(3) When the person against whom the document is sought to be proved is a public officer bound by law to procure its due execution, and he has dealt with it as a document duly executed.<sup>4</sup>

## ARTICLE 71

PROOF WHEN ATTESTING WITNESS DENIES THE  
EXECUTION

If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.<sup>5</sup>

<sup>1</sup> See generally Taylor, ss. 1839-44; Roscoe, 132; Phipson, 500-503; Halsbury, xiii. pp. 641, 766.

<sup>2</sup> *Cooke v. Tanswell*, 1818, 8 Tav. 450; *Poole v. Warren*, 1838, 8 A. & E. 582.

<sup>3</sup> *Pearce v. Hooper*, 1810, 3 Tav. 60; *Rearden v. Minter*, 1843, 5 M. & G. 204. As to the sort of interest necessary to bring a case within this exception, see *Collins v. Bayntun*, 1841, 1 Q.B. 118.

<sup>4</sup> *Plumer v. Brisco*, 1847, 11 Q.B. 46. *Bailey v. Bidwell*, 1844, 13 M. & W. 73, would perhaps justify a slight enlargement of the exception, but the circumstances of the case were very peculiar. Mr. Taylor (ss. 1852-1853) considers it doubtful whether the rule extends to instruments executed by corporations, or to deeds enrolled under the provisions of any Act of Parliament, but his authorities hardly seem to support his view; at all events, as to deeds by corporations.

## ARTICLE 72

PROOF OF DOCUMENT NOT REQUIRED BY LAW TO BE  
ATTESTED

An attested document not required by law to be attested may in all cases whatever, civil or criminal, be proved as if it was unattested.<sup>1</sup>

A document not required by law to be attested may be proved by evidence that it was written or signed by or on behalf of the person who is alleged to have written or signed it.

Evidence that any document or signature is in the handwriting of any person alleged to have written it is admissible to prove that he did write it.<sup>2</sup>

Evidence that a person exists having the same name,<sup>3</sup> address,<sup>4</sup> business or occupation<sup>5</sup> as the maker of a document purports to have, is admissible to show that such document was written or signed by that person.

Evidence that a document exists to which the document the making of which is in issue purports to be a reply, together with evidence of the making and delivery to a person of such earlier document, is admissible to show the identity of the maker of the disputed document with the person to whom the earlier document was delivered.<sup>6</sup>

Evidence that a person signed a document containing

the case stands as if there were no attesting witness": *Talbot v. Hodson*, 1816, 7 Taur. 251, 254.

<sup>1</sup> The Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 7.

<sup>2</sup> As to what evidence is sufficient for this purpose see Article 53. As to opinions as to, and comparisons of handwriting see Articles 52 and 53, and *Doe v. Suckermore* there cited.

<sup>3</sup> *Roden v. Ryde*, 1843, 4 Q.B. 626; and see *Whitelock v. Musgrave*, 1833, 1 Cr. & M. 511, and *Jones v. Jones*, 1841, 9 M. & W. 75.

<sup>4</sup> *Harrington v. Fry*, 1824, Ry. & Mo. 90.

<sup>5</sup> *Greenshields v. Crawford*, 1842, 9 M. & W. 314.

a declaration that a seal was his seal is admissible to prove that he sealed it.<sup>1</sup>

Evidence that the grantor on executing any document requiring delivery expressed an intention that it should operate at once is admissible to prove delivery.<sup>2</sup>

### ARTICLE 73

#### PRESUMPTION AS TO DOCUMENTS TWENTY YEARS OLD

Where any document purporting or proved to be twenty years<sup>3</sup> old is produced from any custody which the judge in the particular case considers proper, it is presumed that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested; and the attestation or execution need not be proved, even if the attesting witness is alive and in court.

Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as

<sup>1</sup> The actual physical presence of a seal, or indeed of any sort of impression, then becomes unnecessary to the validity of a document purporting to be a deed. *Re Sandilands*, 1871, L.R. 6 C.P. 411. A signature, however, in the case of an individual is now essential: L.P.A. 1925 (15 Geo. 5, c. 20), s. 73 (1). See further Article 93. Lindley, L.J., speaks of *Sandilands* as "a good-natured decision in which I am not sure I could have concurred". A sealing is valid, however, if a party seals with a borrowed seal or no seal at all (an old case speaks of biting the wax), and it is not necessary for the party himself to make the impression. See *Norton on Deeds*, 2nd ed. p. 8.

<sup>2</sup> *Xenos v. Wickham*, 1867, L.R. 2 H.L. 296; *Macedo v. Stroud*, [1922] 2 A.C. 330 (J.C.).

<sup>3</sup> Period altered from thirty years by the Evidence Act, 1938, s. 4. The alteration applies both to civil and criminal proceedings.

to render such an origin probable.<sup>1</sup>

### ARTICLE 74

#### SECONDARY EVIDENCE

Secondary evidence means—

- (1) Examined copies, exemplifications, office copies, and certified copies;<sup>2</sup>
- (2) Other copies made from the original and proved to be correct;
- (3) Counterparts of documents as against the parties who did not execute them;<sup>3</sup>
- (4) Oral accounts of the contents of a document given by some person who has himself seen it.

### ARTICLE 75

#### CASES IN WHICH SECONDARY EVIDENCE RELATING TO DOCUMENTS MAY BE GIVEN

Secondary evidence may be given of the contents of a document in the following cases:

- (1) When the original is shown or appears to be in the possession or power of the adverse party, and when, after the notice mentioned in Article 76, he does not produce it;<sup>4</sup>
- (2) When the original is shown or appears to be in the possession or power of a stranger not legally bound to produce it, and who refuses to produce it after being served with a *subpoena duces tecum*, or after having been

<sup>1</sup> Taylor, s. 87 and ss. 658-667; Best, s. 220. Other presumptions relating to documents are contained in Chapter XI.

<sup>2</sup> See Chapter X.

<sup>3</sup> *Munn v. Godbold*, 1825, 3 Bing. 292.

<sup>4</sup> *R. v. Watson*, 1788, 2 T.R. at p. 201. *Entick v. Carrington*, 1765, 19 S.T. at p. 1073, is cited by Mr. Phillips as an authority for this proposition. I do not think it supports it, but it shows the necessity for the rule, as at common law no power existed to compel the production of documents.

sworn as a witness and asked for the document and having admitted that it is in court;<sup>1</sup>

(3) When the original has been destroyed or lost, and proper search has been made for it;<sup>2</sup>

(4) When the original is of such a nature as not to be easily movable,<sup>3</sup> or is in a country from which it is not permitted to be removed;<sup>4</sup>

(5) When the original is a public document;<sup>5</sup>

(6) When the document is an entry in a banker's book, proof of which is admissible under Article 37;

(7) When the original is a document for the proof of which special provision is made by any Act of Parliament or any law in force for the time being;<sup>6</sup> or

(8) When the originals consist of numerous documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection; provided that that result is capable of being ascertained by calculation.<sup>6</sup>

(9) When a seaman sues for his wages he may give secondary evidence of the ship's articles and of any agreement supporting his case, without notice to produce the originals.<sup>7</sup>

Subject to the provisions hereinafter contained, any

<sup>1</sup> *Mills v. Oddy*, 1834, 6 C. & P. at p. 732; *Marston v. Downes*, 1834, 1 A. & E. 31.

<sup>2</sup> Taylor (from Greenleaf), s. 429, and see *R. v. Robinson*, [1917] 2 K.B. 108. The loss may be proved by an admission of the party or his attorney: *R. v. Hawarth*, 1830, 4 C. & P. 254.

<sup>3</sup> *Owner v. Bee Hive Spinning Co.*, [1914] 1 K.B. 105, a case of a notice which was required by statute to be always affixed to the wall of a factory.

<sup>4</sup> *Alivon v. Furnival*, 1834, 1 G.M. & R. 277, 291-292.

<sup>5</sup> See Chapter X.

<sup>6</sup> *Roberts v. Dozon*, 1791, 1 Peake, 116; *Meyer v. Sefton*, 1817, 2 Star, at p. 276. The books, etc., should in such a case be ready to be produced if required. *Johnson v. Kershaw*, 1874, 1 De G. & S. at p. 264.

<sup>7</sup> Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 123.

secondary evidence of a document is admissible.<sup>1</sup>

In case (6) the copies cannot be received as evidence unless it be first proved that the book in which the entries copied were made was at the time of making one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody and control of the bank, which proof may be given orally or by affidavit by a partner or officer of the bank, and that the copy has been examined with the original entry and is correct, which proof must be given by some person who has examined the copy with the original entry and may be given orally or by affidavit.<sup>2</sup>

In case (8) evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

Questions as to the existence of facts rendering secondary evidence of the contents of documents admissible are to be decided by the judge.<sup>3</sup>

## ARTICLE 76

### RULES AS TO NOTICE TO PRODUCE<sup>4</sup>

Secondary evidence of the contents of the documents referred to in Article 75 (1) may not be given unless the

<sup>1</sup> If a counterpart is known to exist, the safest course is to produce it: *Munn v. Goulbold*, 1825, 3 Bing. 297; *R. v. Castleton*, 1795, 6 T. R. 236.

<sup>2</sup> Bankers' Books Evidence Act, 1879 (42 Vict. c. 11), ss. 4-5.

<sup>3</sup> Even, it seems, if this involves his deciding for himself the very question which will in the end be left to the jury; *Doe v. Davies*, 1847, 10 Q.B. 314. *Stowe v. Querner*, 1870, L.R. 5 Ex. 155 is often cited as authority for an exception to the rule on these lines. The headnote is somewhat misleading but the decision gives no support to such a view. The court there held that for the objection and the determination of any facts supporting it to lie within the province of the judge it must be conceded that some original at least exists. If this is denied the objection transcends a mere evidence point and becomes a matter for the jury to decide. Cf. Article 105, p. 130 n.

<sup>4</sup> As to the contents of this Article generally see *Dwyer v. Collins*, below and Taylor, *see* *unpublished* *Rees* *et al.* *Reeson* *et al.* *Phineas*.

party proposing to give such secondary evidence has,

If the original is in the possession or under the control of the adverse party, given him such written<sup>1</sup> notice to produce it as the Court regards as reasonably sufficient to enable it to be procured;<sup>2</sup> or has,

If the original is in the possession of a stranger to the action, served him with a *subpoena duces tecum* requiring its production;<sup>3</sup>

If a stranger so served does not produce the document, and has no lawful justification for refusing or omitting to do so, his omission does not entitle the party who served him with the *subpoena* to give secondary evidence of the contents of the document.<sup>4</sup>

Such notice is not required in order to render secondary evidence admissible in any of the following cases:

(1) When the document to be proved is itself a notice;

(2) When the action is founded upon the assumption that the document is in the possession or power of the adverse party and requires its production;<sup>5</sup>

(3) When it appears or is proved that the adverse party has obtained possession of the original from a person served with a *subpoena* to produce it;<sup>6</sup>

(4) When the adverse party or his agent has the original in court.<sup>7</sup>

<sup>1</sup> R.S.C. O. 66, r. 1.

<sup>2</sup> *Dwyer v. Collins*, 1852, 7 Ex. at p. 648.

<sup>3</sup> *Newton v. Chaplin*, 1850, 10 C.B. 356.

<sup>4</sup> *R. v. Llanfachilly*, 1853, 2 E. & B. 940.

<sup>5</sup> *How v. Hall*, 1811, 14 E. 274. In an action on a bond, no notice to produce the bond is required. See other illustrations in 2 Ph. Ev. 273; Taylor, s. 452.

<sup>6</sup> *Leeds v. Cook*, 1803, 4 Esp. 256.

<sup>7</sup> Formerly doubted, but so held in *Dwyer v. Collins*, 1852, 7 Ex. 639.

## CHAPTER X

### *PROOF OF PUBLIC DOCUMENTS*

#### ARTICLE 77

##### **PROOF OF PUBLIC DOCUMENTS<sup>1</sup>**

WHEN a statement made in any public document, register, or record, judicial or otherwisc, or in any pleading or deposition kept therewith is in issue, or is relevant to the issue in any proceeding, the fact that that statement is contained in that document may be proved in any of the ways mentioned in this chapter.

#### ARTICLE 78

##### **PRODUCTION OF DOCUMENT ITSELF**

The contents of any public document whatever may be proved by producing the document itself for inspection from proper custody, and identifying it as being what it professes to be.

<sup>1</sup> Throughout this chapter the distinction should be kept in mind between the class of documents which are intended to be records of public events so that the statements they contain are themselves evidence of the fact that those events happened (see Article 35), and documents which are public only in the sense that the State requires their contents to be publicly registered, but does not vouch for their truth; e.g. a will or bill of sale. This distinction, however, tends to disappear when the point to be considered is not their effect as evidence but, as in this chapter, the proper mode of their adduction. This is subject, in the case of all public documents, to the consideration founded on public policy that it is inexpedient for the originals of public records to be used by private litigants, who are accordingly encouraged and sometimes compelled to use copies. See Wills, 235.

## ARTICLE 79

## EXAMINED COPIES

The contents of any public document whatever may in all cases be proved by an examined copy.

An examined copy is a copy proved by oral evidence to have been examined with the original and to correspond therewith. The examination may be made either by one person reading both the original and the copy, or by two persons, one reading the original and the other the copy, and it is not necessary (except in peerage cases<sup>1</sup>) that each should alternately read both.<sup>2</sup>

## ARTICLE 80

## GENERAL RECORDS OF THE REALM

Any record under the charge and superintendence of the Master of the Rolls for the time being, may be proved by a copy certified as a true and authentic copy by the deputy keeper of the records or one of the assistant record keepers, and purporting to be sealed or stamped with the seal of the Record Office.<sup>3</sup>

## ARTICLE 81

EXEMPLIFICATIONS<sup>4</sup>

An exemplification is a copy of a record set out either under the Great Seal or under the Seal of a Court.

<sup>1</sup> *Slane Peerage Case*, 1835, 5 C. & F. at p. 42.

<sup>2</sup> Taylor, s. 1545; Roscoe, 100.

<sup>3</sup> 1 & 2 Vict. c. 94, ss. 1, 12, 13.

<sup>4</sup> As to exemplifications, which are now of little practical importance, see Taylor, ss. 36-42; Roscoe, 98-104; Phipson, 519. As to exemplifica-

A copy made by an officer of the Court, bound by law to make it, is equivalent to an exemplification, though it is sometimes called an office copy.

An exemplification is equivalent to the original document exemplified.

### ARTICLE 82

#### COPIES EQUIVALENT TO EXEMPLIFICATIONS

A copy made by an officer of the Court, who is authorised to make it by a rule of Court, but not required by law to make it, is regarded as equivalent to an exemplification in the same cause and Court, but in other causes or Courts it is not admissible unless it can be proved as an examined copy.<sup>1</sup>

### ARTICLE 83

#### CERTIFIED COPIES

It is provided by many statutes that various certificates, official and public documents, documents and proceedings of corporations, and of joint stock and other companies, and certified copies of documents, bye-laws, entries in registers and other books, shall be receivable in evidence of certain particulars in Courts of Justice, provided they are respectively authenticated in the manner prescribed by such statutes.<sup>2</sup>

It is remarkable that the Judicature Acts give no seal to the Supreme Court; but see the Supreme Court of Judicature Act, 1925 (15 & 16 Geo. 5, c. 49), s. 174 and s. 200; cf. p. 82, n.

<sup>1</sup> A convenient modern form of copy has recently come into use in the High Court, namely, a photostat copy of the public original authenticated by the seal of the court.

<sup>2</sup> 8 & 9 Vict. c. 113, preamble. Many such statutes are specified in Taylor, ss. 1601 n.; 1611 n. See, too, Roscoe, 101 ff.

Whenever, by virtue of any such provision, any such certificate or certified copy as aforesaid is receivable in proof of any particular in any Court of Justice, it is admissible as evidence if it purports to be authenticated in the manner prescribed by law without proof of any stamp, seal, or signature required for its authentication or of the official character of the person who appears to have signed it.<sup>1</sup>

Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom is admissible in proof of its contents,<sup>2</sup> provided it purports to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted.<sup>3</sup> Every such officer must furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words.<sup>4</sup>

<sup>1</sup> *Ibid.* s. 1. I believe the above to be the effect of the provision, but the language is greatly condensed. Some words at the end of the section are regarded as unmeaning by several text writers. See, e.g., Roscoe, 100; Taylor, 7th ed. s. 7, note 1. Mr. Taylor says that the concluding words of the section were introduced into the Act while passing through the House of Commons. He adds, they appear to have been copied from 1 & 2 Vict. c. 94, s. 13 (see Article 80), "by some honourable member who did not know distinctly what he was about". They certainly add nothing to the sense.

<sup>2</sup> The words, "provided it be proved to be an examined copy or extract or", occur in the Act, but are here omitted because their effect is given in Article 79.

<sup>3</sup> It is to be observed that the Act does not empower the certifying officer to certify that his custody is the proper one. In some cases the Court will take judicial notice that this is so; in others oral evidence on this point may be necessary. Cf. the more convenient provision of s. 13 of the Act.

<sup>4</sup> 14 & 15 Vict. c. 99, s. 14.

## ARTICLE 84

DOCUMENTS ADMISSIBLE THROUGHOUT THE KING'S  
DOMINIONS

If by any law in force for the time being any document is admissible in evidence of any particular either in Courts of Justice in England and Wales, or in Courts of Justice in Ireland, without proof of the seal, or stamp, or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, that document is also admissible in evidence to the same extent and for the same purpose, without such proof as aforesaid, in any Court or before any judge in any part of the King's dominions except Scotland.<sup>1</sup>

## ARTICLE 85

## KING'S PRINTERS' COPIES

The contents of Acts of Parliament, not being public Acts, may be proved by copies thereof purporting to be printed by the King's printers;

The journals of either House of Parliament; and  
Royal proclamations,  
may be proved by copies thereof purporting to be printed by the printers to the Crown or by the printers to either House of Parliament.<sup>2</sup>

<sup>1</sup> Consolidates 14 & 15 Vict. c. 99, ss. 9, 10, 11, 19. Sect. 9 provides that documents admissible in England shall be admissible in Ireland; sect. 10 is the converse of 9; sect. 11 enacts that documents admissible in either shall be admissible in the "British Colonies"; and sect. 19 defines the British Colonies as including India, the Channel Islands, the Isle of Man, and "all other possessions" of the British Crown, wheresoever and whatsoever. This cannot mean to include Scotland, though the literal sense of the words would perhaps extend to it.

<sup>2</sup> 8 & 9 Vict. c. 113, s. 3. Is there any difference between the King's printers and the printers to the Crown?

## ARTICLE 86

## PROOF OF IRISH STATUTES

The copy of the statutes of the kingdom of Ireland enacted by the Parliament of the same prior to the union of the kingdoms of Great Britain and Ireland, and printed and published by the printer duly authorised by King George III or any of his predecessors, is conclusive evidence of the contents of such statutes.<sup>1</sup>

A copy in Irish or English of any law of the Irish Free State made by such officer as the Chamber of Deputies may appoint is conclusive evidence as to the provisions of any such law.<sup>2</sup>

<sup>1</sup> 41 Geo. 3, c. 90, s. 9.

<sup>2</sup> 13 Geo. 5, Sess. 2, c. 1, s. 1, and Sched. Art. 42.

## ARTICLE 87

## PROCLAMATIONS, ORDERS IN COUNCIL, ETC.

The contents of any proclamation, order, or regulation issued at any time by His Majesty or by the Privy Council, and of any proclamation, order, or regulation issued at any time by or under the authority of any such department of the Government or officer as is mentioned in the first column of the note <sup>3</sup> hereto, may be proved in all

<sup>3</sup> I. Pursuant to Schedule to 31 & 32 Vict. c. 37

## COLUMN 1

NAME OF DEPARTMENT OR OFFICER  
The Commissioners of the Treasury.

The Commissioners for executing the Office of Lord High Admiral.

Secretaries of State.

Committee of Privy Council for Trade.

## COLUMN 2

NAMES OF CERTIFYING OFFICERS  
Any Commissioner, Secretary, or Assistant Secretary of the Treasury.  
Any of the Commissioners for executing the Office of Lord High Admiral or either of the Secretaries to the said Commissioners.  
Any Secretary or Under-Secretary of State.  
Any Member of the Committee, or any Secretary or Assistant Secretary thereof.

or any of the modes hereinafter mentioned; that is to say—

(i) By the production of a copy of the Gazette purporting to contain such proclamation, order, or regulation;

II. Pursuant to Enactments applying 31 & 32 Vict. c. 37 to their Subject-matter

COLUMN 1	COLUMN 2
NAME OF DEPARTMENT OR OFFICER 62 & 63 Vict. c. 33, s. 2 (1). The Board of Education.	Names of Certifying Officers Any Member or the Secretary or Assistant Secretary of the Board.
58 Vict. c. 9, ss. 1, and 3 Ed. 7, c. 31, s. 1, and 9 & 10 Geo. 5, c. 91, s. 1. The Ministry of Agriculture and Fisheries.	The Minister or Secretary or any person authorised by the Minister to act on behalf of the Secretary.
8 Ed. 7, c. 48, s. 36. The Postmaster-General.	Any Secretary or Assistant Secretary of the Post Office.
5 & 6 Geo. 5, c. 91, s. 5. The Army Council.	Two Members, or the Secretary of the A.C. or any person authorised by the A.C. (See the Act as to Scotland and Ireland.)
6 & 7 Geo. 5, c. 65, s. 6. The Minister of Pensions.	The Minister, Secretary of Ministry or person authorised by Minister.
6 & 7 Geo. 5, c. 68, s. 11 (4). The Minister of Labour.	The Minister, Secretary of Ministry or person authorised by Minister.
7 & 8 Geo. 5, c. 51, s. 10 (5). The Air Council.	The President or Secretary or person authorised by President.
9 & 10 Geo. 5, c. 21, s. 7 (5). The Minister of Health.	The Minister, Secretary of Ministry or person authorised by Minister.
9 & 10 Geo. 5, c. 58, s. 2 (5). The Forestry Commissioners.	The Chairman, any other Commissioner, Secretary, or any person authorised to act for Secretary.
14 & 15 Geo. 5, c. 38, s. 88 (6). The National Health Insurance Joint Committee.	The Chairman, other Member, Secretary or person authorised on his behalf.
16 & 17 Geo. 5, c. 36, s. 2 (4). The Commissioners of Works.	Any Commissioner, the Secretary or person authorised on his behalf.
22 & 23 Geo. 5, c. 24, s. 5 (5). The Wheat Commissioners (Byelaws).	Any two Members of the Commission.

Most of these Acts contain separate provisions effecting much the same end in slightly different terms: a curious duplication of legislation.

- (2) By the production of a copy of such proclamation, order, or regulation purporting to be printed by the Government printer, or, where the question arises in a Court in any British colony or possession, of a copy purporting to be printed under the authority of the legislature of such British colony or possession;
- (3) By the production, in the case of any proclamation, order, or regulation issued by His Majesty or by the Privy Council, of a copy or extract purporting to be certified to be true by the Clerk of the Privy Council or by any one of the Lords or others of the Privy Council, and, in the case of any proclamation, order, or regulation issued by or under the authority of any of the said departments or officers, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said note in connection with such department or officer.

Any copy or extract made under this provision may be in print or in writing, or partly in print and partly in writing.

No proof is required of the handwriting or official position of any person certifying, in pursuance of this provision, to the truth of any copy of or extract from any proclamation, order, or regulation.<sup>1</sup>

Subject to any law that may be from time to time made by the legislature of any British Colony or possession, this provision is in force in every such colony and possession.<sup>2</sup>

Where any enactment, whether passed before or after

<sup>1</sup> Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), s. 2.

<sup>2</sup> *Ibid.* s. 3.

June 1882, provides that a copy of any Act of Parliament, proclamation, order, regulation, rule, warrant, circular, list, gazette, or document shall be conclusive evidence, or be evidence, or have any other effect when purporting to be printed by the Government printer, or the King's printer, or a printer authorised by His Majesty, or otherwise under His Majesty's authority, whatever may be the precise expression used, such copy shall also be conclusive evidence, or evidence, or have the said effect, as the case may be, if it purports to be printed under the superintendence or authority of His Majesty's Stationery Office.<sup>1</sup>

#### ARTICLE 88

##### FOREIGN AND COLONIAL ACTS OF STATE, JUDGMENTS, ETC.

All proclamations, treaties, and other acts of state of any foreign state, or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any Court of Justice in any foreign state or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such Court, may be proved either by examined copies or by copies authenticated as hereinafter mentioned; that is to say—

If the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state or British possession to which the original document belongs;

And if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign

<sup>1</sup> Documentary Evidence Act, 1882 (45 Vict. c. 9), s. 2. Sect. 4 extends the Act of 1868 to Ireland.

Court, in any British possession, or an affidavit, pleading, or other legal document filed or deposited in any such Court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or other Court to which the original document belongs, or, in the event of such Court having no seal, to be signed by the judge, or, if there be more than one judge, by any one of the judges of the said Court, and such judge must attach to his signature a statement in writing on the said copy that the court wherof he is judge has no seal;

If any of the aforesaid authenticated copies purports to be sealed or signed as hereinbefore mentioned, it is admissible in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.<sup>1</sup>

Colonial laws assented to by the governors of colonies, and bills reserved by the governors of such colonies for the signification of His Majesty's pleasure, and the fact (as the case may be) that such law has been duly and properly passed and assented to, or that such bill has been duly and properly passed and presented to the governor, may be proved (*prima facie*) by a copy certified by the clerk or other proper officer of the legislative body of the colony to be a true copy of any such law or bill. Any proclamation purporting to be published by authority of the governor in any newspaper in the colony to which such law or bill relates, and signifying His Majesty's disallow-

<sup>1</sup> Evidence Act, 1861 (14 & 15 Vict. c. 99.), s. 7.

ance of any such colonial law, or His Majesty's assent to any such reserved bill is *prima facie* proof of such disallowance or assent.<sup>1</sup>

### ARTICLE 89

#### ENTRIES IN PUBLIC REGISTERS IN CERTAIN COUNTRIES

In the case of countries as to which an Order in Council in that behalf has been made, entries contained in the public registers of such countries may be proved in any court in the United Kingdom by a certificate in such form as may be prescribed by an Order in Council applicable to the country in question.<sup>2</sup>

### ARTICLE 90

#### ANSWERS OF SECRETARY OF STATE AS TO FOREIGN JURISDICTION

The answers of a Secretary of State to questions in a document under the seal of a Court in His Majesty's dominions or held under the authority of His Majesty, framed so as to raise any question which has arisen in any proceedings, civil or criminal, in such Court, as to the existence, or extent, of any jurisdiction of His Majesty in a foreign country, are conclusive evidence of the matters therein contained; and the decisions of the Secretary of State are, for the purpose of the proceedings, final.<sup>3</sup>

<sup>1</sup> 28 & 29 Vict. c. 63, s. 6. "Colony" in this paragraph means "all His Majesty's possessions abroad" having a legislature, "except the Channel Islands, the Isle of Man, and India". "Colony" in the rest of the article includes those places.

<sup>2</sup> Evidence (Foreign, Dominion and Colonial Documents) Act, 1933 (23 Geo. 5, c. 4), s. 1. See, *ante*, p. 55, n.

<sup>3</sup> Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), s. 4.

## CHAPTER XI

### *PRESUMPTIONS AS TO DOCUMENTS*

#### ARTICLE 91.

##### PRESUMPTION AS TO DATE OF A DOCUMENT

WHEN any document bearing a date has been proved, it is presumed to have been made on the day on which it bears date, and if more documents than one bear date on the same day, they are presumed to have been executed in the order necessary to effect the object for which they were executed, but independent proof of the correctness of the date will be required if the circumstances are such that collusion as to the date might be practised, and would, if practised, injure any person, or defeat the objects of any law.<sup>1</sup>

##### *Illustrations*

(a) An instrument admitting a debt, and dated before the act of bankruptcy, is produced by a bankrupt's assignees, to prove the petitioning creditor's debt. Further evidence of the date of the transaction is required in order to guard against collusion between the assignees and the bankrupt, to the prejudice of creditors whose claims date from the interval between the act of bankruptcy and the adjudication.<sup>2</sup>

(b) In a petition for damages on the ground of adultery

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<sup>1</sup> Taylor, s. 169; Best, s. 402. See also Article 73 (Ancient Documents).

<sup>2</sup> *Anderson v. Weston*, 1840, 6 Bing. N.C. at p. 301; *Sinclair v. Baggalay*, 1838, 4 M. & W. 312.

letters are produced between the husband and wife, dated before the alleged adultery, and showing that they were then on affectionate terms. Further evidence of the date is required to prevent collusion, to the prejudice of the person petitioned against.<sup>1</sup>

### ARTICLE 92

#### PRESUMPTION AS TO STAMP OF A DOCUMENT

When any document is not produced after due notice to produce, and after being called for, it is presumed to have been duly stamped,<sup>2</sup> unless it be shown to have remained unstamped for some time after its execution.<sup>3</sup>

### ARTICLE 93

#### PRESUMPTION AS TO SEALING AND DELIVERY OF DEEDS

When any document purporting to be and stamped as a deed, appears or is proved to be or to have been signed and duly attested, it is presumed to have been sealed and delivered, although no impression of a seal appears thereon.<sup>4</sup>

### ARTICLE 94

#### PRESUMPTION AS TO ALTERATIONS

No person producing any document which upon its face appears to have been altered in a material part can claim under it the enforcement of any right created by it, unless the alteration was made before the completion of the

<sup>1</sup> *Houliston v. Smyth*, 1825, 2 C. & P. at p. 24.

<sup>2</sup> *Closmadelus v. Carrel*, 1856, 18 C.B. 36. In this case the growth of the rule is traced, and other cases are referred to, in the judgment of Cresswell, J.

<sup>3</sup> *Marine Investment Company v. Haviside*, 1872, L.R. 5 H.L. 624.

<sup>4</sup> *Hall v. Bainbridge*, 1848, 12 Q.B. 699, at p. 710. *Re Sandilands*, 1871, L.R. 6 C.P. 411. "Where an individual executes a deed (after Jan. 1st, 1926), he shall either sign or place his mark upon the same, and sealing alone shall not be deemed sufficient", 15 Geo. 5, c. 20 (The Law of Property Act, 1925), s. 73 (1). Cf. n. 6 to Article 72, p. 90.

document or with the consent of the party to be charged under it or his representative in interest.

This rule extends to cases in which the alteration was made by a stranger, whilst the document was in the custody of the person producing it, but without his knowledge or leave.<sup>1</sup>

Alterations and interlineations appearing on the face of a deed are, in the absence of all evidence relating to them, presumed to have been made before the deed was completed.<sup>2</sup>

Alterations and interlineations appearing on the face of a will are, in the absence of all evidence relating to them, presumed to have been made after the execution of the will.<sup>3</sup>

There is no presumption as to the time when alterations and interlineations, appearing on the face of writings not under seal, were made<sup>4</sup> except that it is presumed that they were so made that the making would not constitute an offence.<sup>5</sup>

An alteration is said to be material when, if it had been made with the consent of the party charged, it would have affected his interest or varied his obligations in any way whatever.

An alteration which in no way affects the rights of the parties or the legal effect of the instrument, is immaterial.<sup>6</sup>

<sup>1</sup> *Pigot's Case*, 1604, 11 Coke's Rep. 47; *Davidson v. Cooper*, 1843, 11 M. & W. 778; 1844, 13 M. & W. 343; *Aldous v. Cornwell*, 1868, L.R. 3 Q.B. 573. This qualifies one of the resolutions in *Pigot's Case*. The judgment reviews a great number of authorities on the subject.

<sup>2</sup> *Doe v. Catamore*, 1851, 16 Q.B. 745.

<sup>3</sup> *Simmons v. Rudall*, 1850, 1 Sim. (N.S.) 136.

<sup>4</sup> *Knight v. Clements*, 1838, 8 A. & E. 215.

<sup>5</sup> *R. v. Gordon*, 1855, Dearly, 586.

<sup>6</sup> This appears to be the result of many cases referred to in Taylor, ss. 1822, 1823; see also the judgments in *Davidson v. Cooper* and *Aldous v. Cornwell*, referred to above.

## ARTICLE 95

PRESUMPTIONS UNDER THE LAW OF PROPERTY ACT, 1925,  
AS TO ADULTS, RECITALS, AND CORPORATIONS

The persons expressed to be parties to any conveyance shall, until the contrary is proved, be presumed to be of full age at the date thereof.<sup>1</sup>

Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they may be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions.<sup>2</sup>

## ARTICLE 96

## PRESUMPTION AS TO DEEDS OF CORPORATIONS

In favour of a purchaser a deed shall be deemed to have been duly executed by a corporation aggregate if its seal be affixed thereto in the presence of and attested by its clerk, secretary, or other permanent officer or his deputy, and a member of the board of directors, council, or other governing body of the corporation; and where a seal purporting to be the seal of a corporation has been affixed to a deed, attested by persons purporting to be persons holding such offices as aforesaid, the deed shall be deemed to have been executed in accordance with the requirements of this section, and to have taken effect accordingly.<sup>3</sup>

<sup>1</sup> 15 Geo. 5, c. 20, s. 15. See sect. 205 (1), (ii) for a definition of "conveyance".

<sup>2</sup> 15 Geo. 5, c. 20, s. 45 (6), and see subs. (10).

<sup>3</sup> 15 Geo. 5, c. 20, s. 74.

## CHAPTER XII

### *OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE, AND OF THE MODIFICATION AND INTERPRETATION OF DOCUMENTARY BY ORAL EVIDENCE*

#### ARTICLE 97 \*

##### **EVIDENCE OF TERMS OF JUDGMENTS, CONTRACTS, GRANTS AND OTHER DISPOSITIONS OF PROPERTY REDUCED TO A DOCUMENTARY FORM**

WHEN any judgment of any Court or any other judicial or official proceeding, or any contract, or any grant or other disposition of property has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceeding, or of the terms of such contract, grant or disposition of property except the document itself,<sup>1</sup> or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.<sup>2</sup> Nor may the contents<sup>3</sup> of any such document be contradicted, altered, added to or varied by oral evidence:

Provided that any of the following matters may be proved:

(1) Fraud, intimidation, illegality; want of due execu-

\* See Note XIV.

<sup>1</sup> Illustrations (a) and (b).

<sup>2</sup> See Article 75.

<sup>3</sup> This includes terms implied or arrived at by construction of law, *Goldfoot v. Welch*, [1914] 1 Ch. 213.

tion; the fact that it is wrongly dated; existence,<sup>1</sup> or want or failure of, consideration; mistake in fact or law; want of capacity in any contracting party, or the capacity in which a contracting party acted when it is not inconsistent with the terms of the contract; or any other matter which, if proved, would produce any effect upon the validity of any document, or of any part of it, or which would entitle any person to any judgment, decree, or order relating thereto.<sup>2</sup>

(2) The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the Court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them.<sup>3</sup>

(3) The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property.<sup>4</sup>

(4) The existence of any distinct subsequent oral agreement<sup>5</sup> to rescind or modify any such contract, grant or disposition of property.<sup>6</sup>

(5) Any usage or custom by which incidents not expressly mentioned in any contract are annexed to contracts of that description; unless the annexing of such incident to such contract would be repugnant to or inconsistent with the express terms of the contract.<sup>7</sup>

<sup>1</sup> See *Frith v. Frith*, [1906] A.C. 254; see *post*, p. 114, Illustration (e).

<sup>2</sup> Illustrations (c) and (d).

<sup>3</sup> Illustrations, (f), (g) and (h).

<sup>4</sup> Illustrations (i) and (j).

<sup>5</sup> Deeds can be rescinded) *Steeds v. Steeds*, 1889, 22 Q.B.D. 537) or varied (*Berry v. Berry*, [1929] 2 K.B. 316) by parol by the operation of equity, which now prevails; 15 & 16 Geo. 5, c. 49, s. 44.

<sup>6</sup> See *Morris v. Baron*, [1918] A.C. 1, and Illustration (k).

<sup>7</sup> *Wigglesworth v. Dallison*, 1779, and note thereto, 1 S.L.C. 597 ff.

Oral evidence of a transaction is not excluded by the fact that a documentary memorandum of it was made, if such memorandum was not intended to have legal effect as a contract, grant or disposition of property.<sup>1</sup>

Oral evidence of the existence of a legal relation is not excluded by the fact that it has been created by a document, when the fact to be proved is the existence of the relationship itself, and not the terms on which it was established or is carried on.<sup>2</sup>

The fact that a person holds a public office need not be proved by the production of his written or sealed appointment thereto, if he is shown to have acted on it.<sup>3</sup>

### *Illustrations*

(a) A, a bank, sues B as one of five guarantors of an overdraft. B pleads that A released him from his obligation by releasing C, a co-guarantor, without his consent. Evidence that previously to granting C his release, the terms of which were reduced into writing, A had stipulated for the preservation of the co-sureties' rights, was held inadmissible.<sup>4</sup>

(b) A lease contains a covenant to pay rent quarterly in advance. Evidence that previously to the execution of the lease the lessor had agreed to accept a three months' bill in payment of rent was held inadmissible.<sup>5</sup>

(c) A is described in a charter-party as the charterer of a ship. Evidence tendered by the owner of the ship that he acted as agent of the respondent was held admissible, as not being inconsistent with the terms of the charter-party.<sup>6</sup>

A later case is *Johnson v. Rayton*, 1881, 7 Q.B.D. 438, in which it was held that evidence was admissible of a custom that in a contract with a manufacturer for iron plates he warranted them to be of his own make. And see Illustration (l).

<sup>1</sup> Illustration (m).

<sup>2</sup> Illustration (n).

<sup>3</sup> See authorities collected in 1 *Taylor*, s. 171.

<sup>4</sup> *Mercantile Bank of Sydney v. Taylor*, 1893, A.C. 317.

<sup>5</sup> *Henderson v. Arthur*, [1907] 1 K.B. 10.

<sup>6</sup> *Drughorn v. Rederiaktiebolaget Transatlantic*, [1919] A.C. 203, distinguishing *Humble v. Hunter*, 1848, 12 Q.B. 310, and *Formby Bros. v. Formby*, 1910, 102 L.T. 116.

(d) A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be rectified as to one of its provisions, as that provision was inserted in it by mistake.

A may prove that such a mistake was made as would entitle him to have the contract rectified.<sup>1</sup>

(e) A appoints B his attorney to possess and manage property by a document that does not refer to consideration. B sues on the power of attorney; evidence of consideration is admissible to prove that it is irrevocable.<sup>2</sup>

(f) A lets land to B, and they agree that a lease shall be given by A to B.

Before the lease is given, B tells A that he will not sign it unless A promises to destroy the rabbits. A does promise. The lease is afterwards granted, and reserves sporting rights to A, but does not mention the destruction of the rabbits. B may prove A's oral agreement as to the rabbits.<sup>3</sup>

(g) A agrees to let a house to B. A lease is drafted which does not refer to drains. B refuses to hand over the counterpart without A's assurance that the drains are in good order. A gives such an assurance. The drains are not in good order. B sues for breach of warranty. Evidence of the assurance was admitted because it amounted to a collateral warranty.<sup>4</sup>

(h) A and B agree orally that B shall take up an acceptance of A's, and that thereupon A and B shall make a written agreement for the sale of certain furniture by A to B. B does not take up the acceptance. A may prove the oral agreement that he should do so.<sup>5</sup>

(i) A and B enter into a written agreement for the sale of an interest in a patent, and at the same time agree orally that the agreement shall not come into force unless C approves of it. C does not approve. The party interested may show this.<sup>6</sup>

<sup>1</sup> Story's *Equity Jurisprudence*, chap. v. ss. 153-162.

<sup>2</sup> *Frith v. Frith*, [1906] A.C. 254.

<sup>3</sup> *Morgan v. Griffiths*, 1871, L.R. 6 Ex. 70; and see *Angell v. Duke*, 1875, L.R. 10 Q.B. 174.

<sup>4</sup> *De Lassalle v. Guildford*, [1901] 2 K.B. 215 (C.A.).

<sup>5</sup> *Lindley v. Lacey*, 1864, 17 C.B. (N.S.) 578.

<sup>6</sup> *Pym v. Campbell*, 1856, 6 E. & B. 370.

(j) A, a farmer, agrees in writing to transfer to B, another farmer, a farm which A holds of C. It is orally agreed that the agreement is to be conditional on C's consent. B sues A for not transferring the farm. A may prove the condition as to C's consent, and the fact that he does not consent.<sup>1</sup>

(k) A agrees in writing to sell B 14 lots of freehold land and make a good title to each of them. Afterwards B consents to take one lot, though the title is bad. Apart from the Statute of Frauds, this agreement might be proved.<sup>2</sup>

(l) A printed form of contract provided for the sale of goods "to be shipped" by a specified route. Evidence of a usage that it was common practice for goods of this kind to be carried partly by rail was held inadmissible.<sup>3</sup>

(m) A sells B a horse, and orally warrants him quiet in harness. A also gives B a paper in these words: "Bought of A a horse for £17 : 2 : 6".

B may prove the oral warranty.<sup>4</sup>

(n) The question is, whether A gained a settlement by occupying and paying rent for a tenement. The facts of occupation and payment of rent may be proved by oral evidence, although the contract is in writing.<sup>5</sup>

## ARTICLE 98 \*

### WHAT EVIDENCE MAY BE GIVEN FOR THE INTERPRETATION OF DOCUMENTS<sup>6</sup>

(1) Putting a construction upon a document means ascertaining the meaning of the signs or words made upon it, and their relation to facts.

(2) In order to ascertain the meaning of the signs and words made upon a document, oral evidence may be given

\* See Note XV.

<sup>1</sup> *Wallis v. Littell*, 1861, 11 C.B. (N.S.) 369.

<sup>2</sup> *Goss v. Lord Nugent*, 1833, 5 B. & Ad. 58, 65.

<sup>3</sup> *In re Sutro & Heilbut, Symons & Co*, [1917] 2 K.B. 348.

<sup>4</sup> *Allen v. Pink*, 1838, 4 M. & W. 140.

<sup>5</sup> *R. v. Hull*, 1827, 7 B. & C. 611.

<sup>6</sup> See generally Taylor, s. 1149; Best, ss. 226-230; Roscoe, 15-34; Philpott, 555, Halsbury, xii. pp. 713-717; Wills, 106-113.

of the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local, and provincial expressions, of abbreviations, and of common words which, from the context, appear to have been used in a peculiar sense;<sup>1</sup> but evidence may not be given to show that common words, the meaning of which is plain, and which do not appear from the context to have been used in a peculiar sense, were in fact so used.<sup>2</sup>

(3) If the words of a document are so defective or ambiguous as to be unmeaning, no evidence can be given to show what the author of the document intended to say.<sup>3</sup>

(4) In order to ascertain the relation of the words of a document to facts, every fact may be proved to which it refers, or may probably have been intended to refer,<sup>4</sup> or which identifies any person or thing mentioned in it.<sup>5</sup> Such facts are hereinafter called the circumstances of the case.<sup>6</sup>

(5) If the words of a document have a proper legal meaning, and also a less proper meaning, they must be deemed to have their proper legal meaning, unless such a construction would be unmeaning in reference to the circumstances of the case, in which case they may be interpreted according to their less proper meaning.<sup>7</sup>

(6) If the document has one distinct meaning in reference to the circumstances of the case, it must be construed accordingly, and evidence to show that the author intended to express some other meaning is not admissible.<sup>8</sup>

<sup>1</sup> Illustrations (a), (b), (c) and (d).

<sup>2</sup> Illustration (e).

<sup>3</sup> Illustrations (f) and (g).

<sup>4</sup> Illustration (h). See, also, Illustration (r).

<sup>5</sup> Illustration (i).

<sup>6</sup> As to proving facts showing the knowledge of the writer, and for an instance of a document which is not admissible for that purpose, see *Adie v. Clark*, 1876, 3 Ch.D. 134, 142.

<sup>7</sup> Illustration (j).

<sup>8</sup> Illustration (k).

(7) If the document applies in part but not with accuracy or not completely to the circumstances of the case, the Court may draw inferences from those circumstances as to the meaning of the document, whether there is more than one, or only one thing or person to whom or to which the inaccurate description may equally well apply. In such cases no evidence can be given of statements made by the author of the document as to his intentions in reference to the matter to which the document relates, though evidence may be given as to his circumstances, and as to his habitual use of language or names for particular persons or things.<sup>1</sup>

(8) If the language of the document, though plain in itself, applies equally well to more objects than one, evidence may be given both of the circumstances of the case and of statements made by any party to the document as to his intentions in reference to the matter to which the document relates.<sup>2</sup>

(9) If the document is of such a nature that the Court will presume that it was executed with any other than its apparent intention, evidence may be given to show that it was in fact executed with its apparent intention.<sup>3</sup>

#### *Illustrations*

(a) A lease contains a covenant as to "ten thousand rabbits". Oral evidence to show that a thousand meant, in relation to rabbits, 1200, is admissible.<sup>4</sup>

(b) A sells to B "1170 bales of gambier". Oral evidence is admissible to show that a "bale" of gambier is a package compressed, and weighing 2 cwt.<sup>5</sup>

<sup>1</sup> Illustrations (l), (m), (n) and (o).

<sup>2</sup> Illustrations (p), (q), (r) and (s).

<sup>3</sup> Illustration (t).

<sup>4</sup> *Smith v. Wilson*, 1832, 3 B. & Ad. 728.

<sup>5</sup> *Gorrisen v. Perrin*, 1857, 2 C.B. (N.S.) 681.

(c) A, a sculptor, leaves to B "all the marble in the yard, the tools in the shop, bankers, mod tools for carving". Evidence to show whether "mod" meant models, moulds, or modelling-tools, and to show what bankers are, may be given.<sup>1</sup>

(d) A is tenant of B. Coy. of a public-house described in the lease as being "tied". A covenants to buy beer exclusively from B. Coy., "provided they should be willing to supply the same to him at the fair market price". Evidence that B. Coy.'s practice was to supply beer to "tied" houses at fixed and standardised prices, while in the case of beer supplied to "free" houses they made their own bargains, was held admissible to show that B. Coy. had charged A prices which were in accordance with the covenant.<sup>2</sup>

(e) Evidence may not be given to show that the word "boats", in a policy of insurance, means "boats not slung on the outside of the ship on the quarter".<sup>3</sup>

(f) A leaves an estate to K, L, M, etc., by a will dated before 1838. Eight years afterwards A declares that by these letters he meant particular persons. Evidence of this declaration is not admissible. Proof that A was in the habit of calling a particular person M would have been admissible.<sup>4</sup>

(g) A by his will desired and empowered his wife to dispose of his estate "in accordance with my wishes verbally expressed by me to her"; evidence of verbal statements made by him to her was held to be inadmissible and the will was held to be bad for uncertainty.<sup>5</sup>

(h) By the Merchandise Marks Act, 1887, it is an offence to make a false statement in writing of the origin of goods but not to make such a statement orally. A asked B for a leg of New Zealand mutton. B handed meat to him stating that it came from New Zealand, and gave him an invoice in which the meat was described as "a leg of mutton". B on being asked by A to mark on the invoice that it was New

<sup>1</sup> *Goblet v. Beechey*, 1831, 3 Sim. 24; 2 Russ. & Myl. 624.

<sup>2</sup> *Charrington & Co., Ltd. v. Woorder*, [1914] A.C. 71.

<sup>3</sup> *Blackett v. Royal Exchange Co.*, 1832, 2 C. & J. 244.

<sup>4</sup> *Clayton v. Lord Nugent*, 1844, 13 M. & W. 200; see 207-208.

<sup>5</sup> *In re Helle*, [1902] 2 Ch. 866; *aliter* if the will was proved to be lost, or destroyed, *Sugden v. St. Leonards (Lord)*, 1876, 1 P.D. 154. Cf. *Baylis v. A.G.*, 1741, 2 Atk. 239.

Zealand meat wrote thereon the letters "N.Z.". The letters had no trade meaning. Evidence of the conversation was held to be admissible to show that the letters were intended as a trade description.<sup>1</sup>

(i) Property was conveyed in trust in 1704 for the support of "Godly preachers of Christ's holy Gospel". Evidence may be given to show what class of ministers were at the time known by that name.<sup>2</sup>

(j) A leaves property to his "children". If he has both legitimate and illegitimate children the whole of the property will go to the legitimate children. If he has only illegitimate children, the property may go to them, if he cannot have intended to give it to unborn legitimate children.<sup>3</sup>

(k) A testator leaves all his estates in the county of Limerick and city of Limerick to A. He had no estates in the county of Limerick, but he had estates in the county of Clare, of which the will did not dispose. Evidence cannot be given to show that the words "of Clare" had been erased from the draft by mistake, and so omitted from the will as executed.<sup>4</sup>

(l) A leaves a legacy to "Mrs. and Miss Bowden". No such persons were living at the time when the legacy was made, but Mrs. Washburne, whose maiden name had been Bowden, was living, and had a daughter, and the testatrix used to call them Bowden. Evidence of these facts was admitted.<sup>5</sup>

(m) A devises land to John Hiscocks, the eldest son of John Hiscocks. John Hiscocks had two sons, Simon, his eldest, and John, his second son, who, however, was the eldest son by a second marriage. The circumstances of the family, but not the testator's declarations of intention, may be proved in order to show which of the two was intended.<sup>6</sup>

<sup>1</sup> *Cameron v. Wiggins*, [1901] 1 Q.B. 1.

<sup>2</sup> *Shore v. Wilson*, 1842, 9 C. & F. 356, 365 *et seq.*

<sup>3</sup> *Wig. Ext. Ev.*, pp. 18 and 19, and note of cases.

<sup>4</sup> *Miller v. Travers*, 1832, 8 Bing. 244.

<sup>5</sup> *Lee v. Pain*, 1845, 4 Hare, 251-253.

<sup>6</sup> *Doe v. Hiscocks*, 1839, 5 M. & W. 363. Cf. *In re Fish*, *Ingham v. Rayner*, [1894] 2 Ch.D. 83, where F devised property to his niece, E. W. He had no niece so named, but had two grand-nieces of that name, one legitimate, the other illegitimate; evidence of the surrounding circumstances tending to show that the illegitimate niece was meant was not admitted.

(n) A devises property to Elizabeth, the natural daughter of B. B has a natural son John, and a legitimate daughter Elizabeth. The Court may infer from the circumstances under which the natural child was born, and from the testator's relationship to the putative father, that he meant to provide for John.<sup>1</sup>

(o) A leaves a legacy to his niece, Elizabeth Stringer. At the date of the will he had no such niece, but he had a great-great-niece named Elizabeth Jane Stringer. The Court may infer from these circumstances that Elizabeth Jane Stringer was intended; but they may not refer to instructions given by the testator to his solicitor, showing that the legacy was meant for a niece, Elizabeth Stringer, who had died before the date of the will, and that it was put into the will by a mistake on the part of the solicitor.<sup>2</sup>

(p) A devises one house to George Gord the son of George Gord, another to George Gord the son of John Gord, and a third to George Gord the son of Gord. Evidence both of the circumstances and of the testator's statements of intention may be given to show which of the two George Gords he meant.<sup>3</sup>

(q) A appointed "Percival —— of Brighton, Esquire, the father", one of his executors. Evidence of surrounding circumstances may be given to show who was meant, and (probably) evidence of statements of intention.<sup>4</sup>

(r) A holds a grant of crown lands from B. The grant recited that A, "the company, have been authorised to take possession of several portions of land and have ever since been . . . in possession thereof, but no grant thereof has been made to" A. The grant contained nothing as to foreshore, and a question arose as to whether it included it. Evidence that A had occupied and used the foreshore was held admissible.<sup>5</sup>

(s) A government land certificate contains descriptions of a parcel of land by area and by physical boundaries. The

<sup>1</sup> *Ryall v. Hannam*, 1847, 10 Beav. 536.

<sup>2</sup> *Stringer v. Gardiner*, 1859, 27 Beav. 35; 4 De G. & J. 468.

<sup>3</sup> *Doe v. Needs*, 1836, 2 M. & W. 129.

<sup>4</sup> *In the goods of De Rosaz*, 1877, L.R. 2 P.D. 66.

<sup>5</sup> *Van Diemen's Land Coy. v. Table Cape Marine Board*, [1906] A.C. 92, P.C.

descriptions are inconsistent. Evidence of user inconsistent with the description by boundaries was admitted to show that the description by area was the true one.<sup>1</sup>

(t) A leaves two legacies of the same amount to B, assigning the same motive for each legacy, one being given in his will, the other in a codicil. The Court presumes that they are not meant to be cumulative, but the legatee may show, either by proof of surrounding circumstances or of declarations by the testator that they were.<sup>2</sup>

### ARTICLE 99

#### CASES TO WHICH ARTICLES 97 AND 98 DO NOT APPLY

Articles 97 and 98 apply only to parties to documents, and their representatives in interest, and only to cases in which some civil right or civil liability is dependent upon the terms of a document in question. Any person other than a party to a document or his representative in interest may, notwithstanding the existence of any document, prove any fact which he is otherwise entitled to prove; and any party to any document or any representative in interest of any such party may prove any such fact for any purpose other than that of varying or altering any right or liability depending upon the terms of the document.

#### *Illustrations*

(a) The question is, whether A, a pauper, is settled in the parish of Cheadle. A deed of conveyance to which A was a party is produced, purporting to convey land to A for a

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<sup>1</sup> *Watcham v. A.G. of East Africa Protectorate*, [1919] A.C. 533.

<sup>2</sup> *Per Leach, V.C.*, in *Hurst v. Leach*, 1821, 5 Madd. 351, 360-361. The rule in this case was vindicated, and a number of other cases both before and after it were elaborately considered by Lord St. Leonards, when Chancellor of Ireland, in *Hall v. Hill*, 1841, 1 Dru & War. 94, 111-133. See, too, *Jenner v. Ffitch*, 1879, 5 Prob. Div. 106.

valuable consideration. The parish appealing against the order was allowed to call A as a witness to prove that no consideration passed.<sup>1</sup>

(b) The question is, whether A obtained money from B under false pretences. The money was obtained as a premium for executing a deed of partnership, which deed stated a consideration other than the one which constituted the false pretence. B may give evidence of the false pretence although he executed the deed misstating the consideration for the premium.<sup>2</sup>

<sup>1</sup> *R. v. Cheadle*, 1832, 3 B. & Ad. 833.

<sup>2</sup> *R. v. Adamson*, 1843, 2 Moody, 286.

PART III  
PRODUCTION AND EFFECT OF  
EVIDENCE



## CHAPTER XIII <sup>+</sup>

### *BURDEN OF PROOF*

#### ARTICLE 100,

##### HE WHO ASSERTS MUST PROVE

WHOEVER in the course of a judicial proceeding first asserts that a fact exists or does not exist, must prove the existence or non-existence of such fact.

#### ARTICLE 101

##### GENERAL BURDEN OF PROOF ON THE PLEADINGS

The party whose pleading first contains,<sup>1</sup> or is deemed first to contain, an allegation of the existence or non-existence of any fact in issue is deemed for the purposes of the preceding Article to have first asserted the existence or non-existence of such fact.

#### ARTICLE 102

##### WHEN THE BURDEN OF PROOF SHIFTS

In civil cases the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgment of the Court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings.

If such party adduces evidence which ought reasonably

\* See Note XVI.

<sup>1</sup> A matter of substantive law coupled with R.S.C. O. xix, r. 25.

to satisfy the jury<sup>1</sup> that the fact sought to be proved is established, the burden lies on the party against whom judgment would be given if no more evidence were adduced; and so on successively, until all the issues in the pleadings have been dealt with.<sup>2</sup>

Where there are conflicting presumptions, the case is the same as if there were conflicting evidence.

### *Illustrations*

(a) It appears upon the pleadings that A is indorser of a bill of exchange. The presumption is that the indorsement was for value and the party interested in denying this must prove it.<sup>3</sup>

(b) A deed of gift is shown to have been made by a client to his solicitor. The burden of proving that the transaction was in good faith is on the solicitor.<sup>4</sup>

(c) It is shown that a hedge stands on A's land. The

<sup>1</sup> See per Willes, J., in *Ryder v. Wombwell*, 1868, L.R. 4 Ex. 32 at p. 39, approved in *Hiddle v. National F. & M. Ins. Coy. of New Zealand*, [1896] A.C. 372. See, too, *Abrah v. N.E.R.*, 1883, 11 Q.B. 440, especially the judgment of Bowen, L.J., at pp. 455-462. There can only be sufficient evidence to shift the onus from one side to the other if the evidence is sufficient *prima facie* to establish the case of the party on whom the onus lies; per Lord Hanworth, M.R., in *Stoney v. Eastbourne R.D.C.*, [1927], 1 Ch. 367, at p. 397, and see p. 405; see Taylor, ss. 364-366, Best, s. 268; Phipson, 31, Halsbury, xiii. pp. 542 *et seq.* If the available evidence is incomplete or defective the incidence of the burden of proof may well be the deciding factor. For a striking instance see *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corporation, Ltd.* ([1942] A.C. 154).

<sup>2</sup> It is to be observed that the shifting of the burden of proof referred to in the last sentence of the second paragraph of this Article presupposes that the plea of the defendant amounts to one of confession and avoidance as opposed to a traverse. It can therefore arise only in civil cases, since, except in pleas in bar and the anomalous case of insanity, the criminal law permits only the defence of a general traverse, and never one of confession and avoidance. This bears out the view expressed by Lord Reading (see Note XVI, p. 215) that in criminal cases the burden never shifts. The burden of proof mentioned in Articles 104 and 105 shifts just as much in criminal as in civil cases.

<sup>3</sup> *Mills v. Barber*, 1836, 1 M. & W. 425; see now Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61) s. 30 (1).

<sup>4</sup> 1 Story, *Equity Jurisprudence*, s. 310, n. c. quoting *Hunter v. Atkins*, 1832, 3 M. & K. 113.

burden of proving that the ditch adjacent to it was not A's also is on the person who denies that the ditch belongs to A.<sup>1</sup>

(d) A proves that he received the rent of land. The presumption is, that he is owner in fee simple, and the burden of proof is on the person who denies it.<sup>2</sup>

(e) A finds a jewel mounted in a socket, and gives it to B to look at. B keeps it, and refuses to produce it on notice, but returns the socket. The burden of proving that it is not as valuable a stone of the kind as would go into the socket is on B.<sup>3</sup>

(f) A sues B on a policy of insurance, and shows that the vessel insured went to sea, and that after a reasonable time no tidings of her have been received, but that her loss has been rumoured. The burden of proving that she has not foundered is on B.<sup>4</sup>

#### ARTICLE 103

##### BURDEN OF PROOF WHEN THE COMMISSION OF A CRIME IS IN ISSUE; PRESUMPTION OF INNOCENCE

If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt.<sup>5</sup>

The burden of proving that any person has been guilty of a crime or wrongful act is on the person who asserts it, whether the commission of such act is or is not directly in issue in the action.

If the prosecution prove the commission of a crime beyond reasonable doubt, the burden of proving reasonable doubt is shifted on to the accused.

#### *Illustrations*

(a) A is accused of receiving goods knowing them to have been stolen. The prosecution prove that the goods were

<sup>1</sup> *Guy v. West*, 1808, Selw. N.P. 1244.

<sup>2</sup> *Doe v. Coulthred*, 1837, 7 A. & E. 235.

<sup>3</sup> *Armory v. Delamirie*, 1722, 1 Stra. 505.

<sup>4</sup> *Koster v. Reed*, 1826, 6 B. & C. 19.

<sup>5</sup> *Washington v. Director of Public Prosecutions*, 1927 A.C. 62.

stolen and that the accused was in possession of them. The burden of proving the existence of reasonable doubt is then on the accused, and he discharges it if he proves that he bought the goods in the ordinary way of business from a man he was accustomed to deal with.<sup>1</sup>

(b) A prosecutes B for theft, and alleges that B admitted the theft to C. A must prove the admission. B asserts that at the time in question he was elsewhere, he must prove it.

(c) A sues B on a policy of fire insurance. B pleads that A burnt down the house insured. B must prove his plea beyond reasonable doubt.<sup>2</sup>

(d) The question in 1819 is whether A is settled in the parish of a man to whom she was married in 1813. It is proved that in 1812 she was married to another person who enlisted soon afterwards, went abroad on service, and had not been heard of afterwards. The burden of proving that the first husband was alive at the time of the second marriage is on the person who asserts it.<sup>3</sup>

## ARTICLE 104

### BURDEN OF PROOF AS TO PARTICULAR FACT

The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the burden of proving the fact shall lie on any particular person; <sup>4</sup> but the burden may in the course of a case be shifted from one side to the other, and in considering the amount of evidence necessary to shift the burden of proof the Court has regard to the opportunities of knowledge with respect

<sup>1</sup> *R. v. Schama and Abramovitch*, 1914, 84 L.J. (K.B.) 396, which follows the established rule that proof of recent possession of stolen goods may be sufficient evidence of receiving; and see *R. v. Partridge*, 1836, 7 C. & P. 551; see Archbold, 413. Cf. n. 2 to Article 102.

<sup>2</sup> *Thurtell v. Beaumont*, 1823, 1 Bing. 339.

<sup>3</sup> *R. v. Twyning*, 1819, 2 B. & Ald. 386.

<sup>4</sup> For instances of such provisions see Taylor, s. 372, n. 6; and see the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 39 (2) (relating to proof of negatives).

to the fact to be proved which may be possessed by the parties respectively.<sup>1</sup>

### *Illustrations*

(a) A is charged with being in possession of house-breaking implements by night. The prosecution give evidence that A was found at 5.15 A.M. in the dressing-room of some playing fields in possession of a bricklayer's chisel. The burden of proving a lawful excuse lies on A by statute (24 & 25 Vict. c. 96, s. 58, now repealed and re-enacted by 6 & 7 Geo. 5, s. 28 (2)). He gives evidence that he is a bricklayer, that he was on his way to a job, and that the tool was used by him in his trade. The burden of proving want of lawful excuse shifts back to the prosecution.<sup>2</sup>

(b) A is lawfully passing along a street and a barrel of flour falls on him from an upper window of B's shop. On A's giving evidence of these facts, *res ipsa loquitur* and the burden of proving absence of negligence shifts to B.<sup>3</sup>

(c) A, a shipowner, sues B, an underwriter, on a policy of insurance on a ship. B alleges that A knew of and concealed from B material facts. B must give enough evidence to throw upon A the burden of disproving his knowledge; but slight evidence will suffice for this purpose.<sup>4</sup>

(d) In an action for malicious prosecution the plaintiff must prove (1) his innocence; (2) want of reasonable and probable cause for the prosecution; (3) malice or indirect motive; and he must prove all that is necessary to establish each proposition sufficiently to throw the burden of disproving that proposition on the other side.<sup>5</sup>

(e) In actions for penalties under the old game laws, though the plaintiff had to aver that the defendant was not duly qualified, and was obliged to give general evidence that

<sup>1</sup> See Halsbury, xiii. pp. 544-546, and *Stoney v. Eastbourne R.D.C.*, [1927] 1 Ch. 367 (C.A.) at pp. 383, 405.

<sup>2</sup> *R. v. Ward*, [1915] 3 K.B. 696.

<sup>3</sup> *Byrne v. Boadle*, 1863, 33 L.J. (Ex.) 13.

<sup>4</sup> *Elkin v. Janson*, 1845, 13 M. & W. 655. See, especially, the judgment of Alderson, B., at pp. 663-666.

<sup>5</sup> *Abrah v. North Eastern Railway*, 1883, 11 Q.B.D. 440.

he was not, the burden of proving any definite qualification was on the defendant.<sup>1</sup>

### ARTICLE 105

#### BURDEN OF PROVING A FACT TO BE PROVED TO MAKE EVIDENCE ADMISSIBLE OR INADMISSIBLE

The burden of proving any fact necessary to be proved in order—

- (a) to enable a person to adduce evidence of some other fact, or
- (b) to prevent the opposite party from adducing evidence of some other fact,

lies on the person who wishes to adduce, or to prevent the adduction of such evidence, respectively.<sup>2</sup>

The existence or non-existence of facts relating to the admissibility of evidence under this Article is to be determined by the judge.<sup>3</sup>

#### *Illustrations*

(a) The fact that a witness is competent to make a declaration as to pedigree under Article 32 must be proved by the party tendering the declaration.<sup>4</sup>

(b) The fact that a declarant expected to die must be proved by the party tendering his declaration, in order to make it relevant under Article 27.<sup>5</sup>

<sup>1</sup> But now see 42 & 43 Vict. c. 49, s. 39, *ubi supra*. The illustration is founded more particularly on *R. v. Jarvis*, in a note to *R. v. Stone*, 1801, 1 Ea. 639, where Lord Mansfield's language appears to imply what is stated above.

<sup>2</sup> See Illustrations.

<sup>3</sup> See the cases cited below, and per Lord Penzance in *Hitchins v. Eardley*, 1871, L.R. 2 P. & D. 248. The decision in *Stowe v. Querner*, 1870, L.R. 5 Ex. 155, is no authority to the contrary. See p. 94, n.

<sup>4</sup> *Doe v. Davies*, 1847, 10 Q.B. 314.

<sup>5</sup> *R. v. Perry*, [1909] 2 K.B. 697.

(c) If a party gives evidence in chief of an oral contract and denies that the contract was in writing, his opponent must prove that it was in writing before the evidence of an oral contract is excluded. Such proof may be interposed during the opposite party's case.<sup>1</sup>

### ARTICLE 106

#### BURDEN OF PROOF WHEN PARTIES STAND IN A FIDUCIARY RELATION

When persons stand in a relation to each other of such a nature that the one reposes confidence in the other, or is placed by circumstances under his authority, control, or influence, and when a question arises as to the validity of any transaction between them from which the person in whom confidence is reposed or in whom authority or influence is vested derives advantage, the burden of proving that the confidence, authority, or influence was not abused, and that the transaction was in good faith and valid, is on the person in whom such confidence is reposed, or authority or influence is vested, and the nature and amount of the evidence required for this purpose depends upon the nature of the confidence or authority, and on the character of the transaction.<sup>2</sup>

<sup>1</sup> *Cox v. Couveless*, 1860, 2 F. & F. 139.

<sup>2</sup> See Story, *Eq. Jur.* ss. 307 *et seq.* Also Taylor, s. 151 and following. The illustrations of the principle are innumerable, and very various.

## CHAPTER XIV

### ON PRESUMPTIONS AND ESTOPPELS \*

#### ARTICLE 107

##### PRESUMPTION OF LEGITIMACY

THE fact that any person was born during the continuance of a valid marriage between his mother and any man, or within such a time after the dissolution thereof and before the celebration of another valid marriage, that his mother's husband could have been his father, is conclusive proof that he is the legitimate child of his mother's husband, unless it can be shown—

either that his mother and her husband had no access to each other at any time when he could have been begotten, regard being had both to the date of the birth and to the physical condition of the husband,

or that the circumstances of their access (if any) were such as to render it highly improbable that sexual intercourse took place between them when it occurred.

Neither the mother nor the husband is a competent witness as to the fact of their having or not having had sexual intercourse with each other where the legitimacy of the woman's child would be affected, even if the proceedings in the course of which the question arises are proceedings instituted in consequence of adultery,<sup>1</sup> nor are any declarations by them upon that subject deemed

\* See Note XVI.

<sup>1</sup> *Russell v. Russell*, [1924] A.C. 687. The rule only affects statements as to non-access. It does not exclude other statements as to paternity. It applies, however, to non-access both when the parties are living together and when they are separated whether voluntarily or by order of the Court (*Ettenfield v. Ettenfield*, [1940] P. 96, C.A.).

to be relevant, whether the mother or her husband can be called as a witness or not; provided that, in applications for affiliation orders when proof has been given of the non-access of the husband at any time when his wife's child could have been begotten, the wife may give evidence as to the person by whom it was begotten.<sup>1</sup> Letters written by the mother may, as part of the *res gestae*, be admissible evidence to show illegitimacy, though the mother could not be called as a witness to prove the statements contained in such letters.<sup>2</sup>

#### ARTICLE 108

##### PRESUMPTION OF DEATH FROM SEVEN YEARS' ABSENCE AND OTHER FACTS

A person shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him, is presumed to be dead unless the circumstances of the case are such as to account for his not being heard of without assuming his death; but there is no presumption as to the time when he died, and the burden of proving his death at any particular time is upon the person who asserts it.<sup>3</sup>

<sup>1</sup> *R. v. Luffe*, 1807, 8 *Ea.* 193 at p. 207; *Cope v. Cope*, 1833, 1 *Mo. & Ro.* 269 and at p. 273; *Legge v. Edmonds*, 1856, 25 *L.J. (Eq.)* 125 at p. 135; *R. v. Mansfield*, 1841, 1 *Q.B.* 444; *Morris v. Davies*, 1827, 3 *C. & P.* 215. See *Hawes v. Draeger*, 1883, 23 *Ch.D.* 173. I am not aware of any decision as to the paternity of a child born, say, six months after the death of one husband, and three months after the mother's marriage to another husband. A confession of adultery by a wife stating that she is pregnant in consequence is admissible in divorce proceedings so long as she does not assert that her husband could not have had access at the time of conception: *Warren v. Warren*, [1925] *P. 107*.

<sup>2</sup> *Aylesford Peerage Case*, 1885, 11 *App. Ca.* 1, in which the general rule stated above is considered and affirmed.

<sup>3</sup> *McMahon v. McElroy*, 1869, 5 *Ir. Rep. Eq. 1*; *Hopewell v. De Pinna*, 1809, 2 *Camp.* 113; *Nepean v. Doe*, 1837, 2 *M. & W.* 894; *R. v. Lumley*, 1869, 1 *C.C.R.* 196; and see the caution of Lord Denman in *R. v. Harborne*, 1835, 2 *A. & E.* at p. 544. All the cases are considered *In*

For the purpose of determining title to property where two or more persons have died in circumstances in which it is uncertain which survived the other, they are presumed to have died in order of seniority.<sup>1</sup>

There is no presumption as to the age at which a person died who is shown to have been alive at a given time.<sup>2</sup>

### ARTICLE 109

#### PRESUMPTION OF LOST GRANT

When it has been shown that any person has, for a long period of time, exercised any proprietary right which might have had a lawful origin by grant or licence from the Crown or from a private person, and the exercise of which might, and naturally would have been, prevented by the persons interested if it had not had a lawful origin, there is a presumption that such right had a lawful origin and that it was created by a proper instrument which has been lost.<sup>3</sup>

#### *Illustrations*

(a) The question is, whether B is entitled to recover from A the possession of lands which A's father and mother suc-

*re Phene's Trust*, 1869, 5 Ch. App. 139. See also *Prudential Assurance Coy. v. Edmonds*, 1877, 2 App. Ca. 487, and *In re Corbishley's Trusts*, 1880, 14 Ch.D. 846. Statutory effect is given to the presumption by s. 8 of the Matrimonial Causes Act, 1937 (1 Edw. 8 and 1 Geo. 6, c. 57), which authorises the presentation of a petition to presume death.

<sup>1</sup> The Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 184, applicable to persons who died after 1 Jan. 1926. After an acute conflict of judicial opinion, the House of Lords has now decided that the section applies where, as in a case of death by enemy action, the death of several persons may be so nearly contemporaneous that you cannot say that any one of them "died" (whatever criterion you select as the moment when life becomes extinct) before the others (*Hickman v. Peacey*, [1945] 2 A.E.R. 215).

<sup>2</sup> *Wing v. Angrave*, 1860, 8 H.L.C. 183, 198.

<sup>3</sup> The subject of lost grants is much considered in *Angus v. Dalton*, 1881, 3 Q.B.D. 84, 6 App. Ca. 740; and see *Hammerton v. Dysart (Earl)*, [1916] 1 A.C. 57.

cessively occupied from 1754 to 1792 or 1793, and which B had occupied (without title) from 1793 to 1809. The lands formed originally an encroachment on the Forest of Dean.

The undisturbed occupation for thirty-nine years raises a presumption of a grant from the Crown to A's father.<sup>1</sup>

(b) A fishing mill-dam was erected more than 110 years before 1861 in the River Derwent, in Cumberland (not being navigable at that place), and was used for more than sixty years before 1861 in the manner in which it was used in 1861. This raises a presumption that all the upper proprietors whose rights were injuriously affected by the dam had granted a right to erect it.<sup>2</sup>

(c) A borough corporation proved a prescriptive right to a several oyster fishery in a navigable tidal river. The free inhabitants of ancient tenements in the borough proved that from time immemorial and claiming as of right they had dredged for oysters, within the limits of the fishery, from February 2nd to Easter Eve in each year. The Court presumed a grant from the Crown to the corporation before legal memory of a several fishery, with a condition in it that the free inhabitants of ancient tenements in the borough should enjoy such a right.<sup>3</sup>

(d) A builds a windmill near B's land in 1829, and enjoys a free current of air to it over B's land as of right, and without interruption till 1860. This enjoyment raises no presumption of a grant by B of a right to such a current of air, as it would not be natural for B to interrupt it.<sup>4</sup>

(e) No length of enjoyment of water percolating through underground undefined passages raises a presumption of a grant from the owners of the ground under which the water so percolates of a right to the water.<sup>5</sup>

<sup>1</sup> *Goodliffe v. Baldwin*, 1809, 11 E.A. 488. The presumption was rebutted in this case by an express provision of 20 Ch. 2, c. 3, avoiding grants of the Forest of Dean.

<sup>2</sup> *Leconfield v. Lonsdale*, 1870, L.R. 5 C.P. 657.

<sup>3</sup> *Goodman v. Mayor of Saltash*, 1882, 7 App. Ch. 633 (see especially 650). Lord Blackburn dissented on the ground that such a grant would not have been legal (pp. 651-662). See same case in 1881, 7 Q.B.D. 106, and 1880, 5 C.P.D. 431, both of which were reversed.

<sup>4</sup> *Webb v. Bird*, 1863, 13 C.B. (N.S.) 841.

<sup>5</sup> *Chasemore v. Richards*, 1859, 7 H.L.C. 349.

## ARTICLE III

PRESUMPTION OF REGULARITY AND OF DEEDS TO  
COMPLETE TITLE<sup>1</sup>

When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with.

When it is shown that any person acted in a public capacity it is presumed that he had been duly appointed and was entitled so to act.<sup>2</sup>

When a person in possession of any property is shown to be entitled to the beneficial ownership thereof, there is a presumption that every instrument has been executed which it was the legal duty of his trustees to execute in order to perfect his title.<sup>3</sup>

Where a minute is produced purporting to be signed by the chairman of a company incorporated under the Companies Act, 1929, and purporting to be a record of proceedings at a meeting of the company, or of its directors, it is presumed, until the contrary is shown, that such meeting was duly held and convened and that all proceedings thereat have been duly had, and that all appointments of directors, managers, and liquidators are valid.<sup>4</sup>

## ARTICLE III \*

## ESTOPPEL BY CONDUCT

When one person by anything which he does or says,

\* See Note XVII.

<sup>1</sup> This Article, and particularly the first paragraph thereof, give effect to the presumption of *omnia rite esse acta*; as to which see Taylor, ss. 143-149; *Bcst*, ss. 355-364; *Halsbury*, xiii, pp. 635-636. Cf. Article 54.

<sup>2</sup> *Berryman v. Wise*, 1791, 4 T.R. 366, 2 R. & R. 413; *Pritchard v. Walker*, 1827, 3 C. & P. 212. Cf. Article 97, p. 113.

<sup>3</sup> *Doe d. Hammond v. Cooke*, 1829, 6 Bing. 174, 179.

<sup>4</sup> Companies Act, 1929 (19 & 20 Geo. 5, c. 23), s. 120.

or abstains from doing or saying, intentionally<sup>1</sup> causes or permits another person to believe that a fact exists, and to act upon such belief otherwise than but for that belief he would have acted, neither the person first mentioned nor his representative in interest is allowed, in any suit or proceeding between himself and such person or his representative in interest, to deny the existence of that fact.

When any person under a legal duty to any other person to conduct himself with reasonable caution in the transaction of any business neglects that duty, and when the person to whom the duty is owing alters his position for the worse because he is misled as to the conduct of the negligent person by a fraud, of which such neglect is in the natural course of things the proximate cause, the negligent person is not permitted to deny that he acted in the manner in which the other person was led by such fraud to believe him to act.

#### *Illustrations*

(a) A, the owner of machinery in B's possession, which is taken in execution by C, abstains from claiming it for some months, and converses with C's attorney without referring to his claim, and by these means impresses C with the belief that the machinery is B's. C sells the machinery. A is estopped from denying that it is B's.<sup>2</sup>

(b) A, a retiring partner of B, gives no notice to the customers of the firm that he is no longer B's partner. In an action by a customer, he cannot deny that he is B's partner.<sup>3</sup>

(c) A sells a farm to B, and innocently represents to him that it is liable to vicarial tithe only. Subsequently it is discovered that the farm is subject to lay tithe, and that A is the lay impropriator. A is estopped from claiming as against B that he is entitled to the lay tithe.<sup>4</sup>

<sup>1</sup> *Low v. Bouverte*, [1891] 3 Ch. 82 (C.A.).

<sup>2</sup> *Pickard v. Sears*, 1837, 6 A. & E. 469, 474.

<sup>3</sup> (Per Parke, B.) *Freeman v. Cooke*, 1848, 2 Ex 663.

<sup>4</sup> *Mansel-Lewis v. Lees*, 1910, 102 L.T. 237.

(d) A contracts with the S. Co., a newly formed Company, to take a fixed minimum quantity of their products annually, subject to certain rights of assignment by A of his contract to a foreign company. A also acts as underwriter of the S. Co.'s shares, and as such is party to a prospectus which stated the fact that A remains bound to the S. Co. for a definite number of years. In an action by A against the S. Co. for a declaration that he had freed himself from liability to the S. Co. by assigning both the burden and benefit of his contract to a foreign company it was held that, whatever the true construction of the contract might be, he was estopped from saying that he had transferred the burden to the foreign company.<sup>1</sup>

(e) A signs blank cheques and gives them to his wife to fill up as she wants money. A's wife fills up a cheque for £50 : 2s. so carelessly that room is left for the insertion of figures before the 50 and for the insertion of words before the "fifty". She then gives it to a clerk of A's to get it cashed. He wrote 3 before 50, and "three hundred and" before "fifty". A's banker pays the cheque so altered in good faith. A cannot recover against the banker.<sup>2</sup>

(f) A railway company negligently issues two delivery orders for the same wheat to A, who fraudulently raises money from B as upon two consignments of different lots of wheat. The railway is liable to B for the amount which A fraudulently obtained by the company's negligence.<sup>3</sup>

(g) A carelessly leaves his door unlocked, whereby his goods are stolen. He is not estopped from denying the title of an innocent purchaser from the thief.<sup>4</sup>

<sup>1</sup> *De Tchihatchef v. Salerni Coupling Ltd.*, [1932] 1 Ch. 330.

<sup>2</sup> *Young v. Grote*, 1827, 4 Bing. 253, approved in *London Joint-Stock Bank v. Macmillan*, [1918] A.C. 777.

<sup>3</sup> *Coventry v. G.E.R.*, 1883, 11 Q.B.D. 776.

<sup>4</sup> Per Blackburn, J., in *Swan v. N.B. Australasian Co.*, 1863, 2 H. & C. 181. See *Baxendale v. Bennett*, 1878, 3 Q.B.D. 525. The earlier cases on the subject are much discussed in *Jorden v. Money*, 1854, 5 H.L. Ca. 200-216, 249-257.

## ARTICLE 112

## ESTOPPEL OF TENANT AND LICENSEE

No tenant and no person claiming through any tenant of any land or hereditament of which he has been let into possession, or for which he has paid rent, is, till he has given up possession, permitted to deny that the landlord had, at the time when the tenant was let into possession or paid the rent, a title to such land or hereditament;<sup>1</sup> and no person who came upon any land by the licence of the person in possession thereof is, whilst he remains on it, permitted to deny that such person had a title to such possession at the time when such licence was given.<sup>2</sup>

## ARTICLE 113

## ESTOPPEL OF PARTIES TO A BILL OF EXCHANGE

The acceptor of a bill of exchange is precluded from denying to a holder in due course (a) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill; (b) in the case of a bill payable to drawer's order, the then capacity of the drawer to endorse the bill, but not the genuineness or validity of his endorsement; (c) in the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to endorse, but not the genuineness and validity of his endorsement;<sup>3</sup> and (d) in the case of a bill accepted in blank, the fact that the drawer endorsed it.<sup>4</sup>

<sup>1</sup> *Doe v. Barton*, 1840, 11 A. & E. 307; *Doe v. Smythe*, 1815, 4 M. & S. 347; *Doe v. Pegg*, 1785, 1 T.R. 758 (note).

<sup>2</sup> *Doe v. Baytup*, 1835, 3 A. & E. 188.

<sup>3</sup> Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 54 (2).

<sup>4</sup> *L. & S.W. Bank v. Wentworth*, 1880, 5 Ex. D. 96.

The drawer of a bill by drawing it is precluded from denying to a holder in due course the existence of the payee, and his then capacity to endorse.<sup>1</sup>

The endorser of a bill by endorsing it is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous endorsements.<sup>2</sup>

#### ARTICLE 114

##### ESTOPPEL OF BAILEE, AGENT, AND LICENSEE

No bailee,<sup>3</sup> agent, or licensee is permitted to deny that the bailor, principal, or licensor, by whom any goods were entrusted to any of them respectively was entitled to those goods at the time when they were so entrusted.

Provided that any such bailee, agent, or licensee may show that he was compelled to deliver up any such goods to some person who had a right to them as against his bailor, principal, or licensor, or that his bailor, principal, or licensor, wrongfully and without notice to the bailee, agent, or licensee, obtained the goods from a third person who has claimed them from such bailee, agent, or licensee.<sup>4</sup>

Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel, is conclusive proof

<sup>1</sup> Bills of Exchange Act, 1882, s. 55 (1).

<sup>2</sup> *Id.* s. 55 (2).

<sup>3</sup> This does not apply to a bailee who has some other interest in the goods such as an option to purchase them: *Karflex Ltd. v. Poole*, [1933] 2 K.B. 251.

<sup>4</sup> *Dixon v. Hammond*, 1819, 2 B. & A. 310; *Crossley v. Dixon*, 1863, 10 H.L.C. 293; *Gosling v. Birnie*, 1831, 7 Bing. 339; *Hardman v. Wilcock*, 1832 (?), 9 Bing. 382 (n.); *Biddle v. Bond*, 1865, 34 L.J. (Q.B.) 137; *Wilson v. Anderton*, 1830, 1 B. & Ad. 450. As to carriers see *Sheridan v. New Quay*, 1858, 4 C.B. (N.S.) 618. But see also *Ranson v. Platt*, [1911] 2 K.B. 291 (C.A.), and *Banco de Vizcaya v. Don Alfonso de Borbon*, [1935] 1 K.B. 140.

of that shipment as against the master or other person signing the same, notwithstanding that some goods or some part thereof may not have been so shipped, unless such holder of the bill of lading had actual notice at the time of receiving the same that the goods had not been in fact laden on board, provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper or of the holder or some person under whom the holder holds.<sup>1</sup>

<sup>1</sup> Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), s. 3.

## CHAPTER XV

### *OF THE COMPETENCY AND COMPELLABILITY OF WITNESSES \**

#### 'ARTICLE 115 WHO MAY TESTIFY

ALL persons are competent and compellable to testify in all cases except as hereinafter excepted.

#### ARTICLE 116 WHAT WITNESSES ARE INCOMPETENT

A witness is incompetent if in the opinion of the judge he is prevented by extreme youth, disease affecting his mind, or any other cause of the same kind, from recollecting the matter on which he is to testify, from understanding the questions put to him, from giving rational answers to those questions, or from knowing that he ought to speak the truth.<sup>1</sup>

A witness unable to speak or hear is not incompetent, but may give his evidence by writing or by signs, or in any other manner in which he can make it intelligible; but such writing must be written and such signs made in open Court. Evidence so given is deemed to be oral evidence.<sup>2</sup>

\* See Note XVIII.

<sup>1</sup> The judge decides the matter after examination on the *voire dire*. See Taylor, s. 1375; Best, ss. 146-165; Phipson, 449-457; Halsbury, xiii. pp. 722-724. A witness under sentence of death was said to be incompetent in *R. v. Webb*, 1867, 11 Cox, 133, *sed quaere*. As to children see p. 159, *post*.

<sup>2</sup> See Taylor, s. 1376; Best, s. 148; Phipson, 433-443.

## ARTICLE II7 \*

COMPETENCY IN CRIMINAL CASES<sup>1</sup>

In criminal cases the accused person, and his or her wife or husband, and every person and the wife or husband of every person jointly indicted with him, and tried at the same time,<sup>2</sup> is incompetent to testify;<sup>3</sup> except as hereinafter mentioned.

Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, is a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person; provided as follows:

a person so charged shall not be called as a witness except upon his own application; and

the wife or husband of a person so charged cannot be called as a witness except upon the application of the person so charged.<sup>4</sup>

\* See Note XIX.

<sup>1</sup> The Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), by sect. 6 thereto, applies "to all criminal proceedings notwithstanding any enactment in force at the commencement of this Act", except proceedings for non-repair of highways (see *post*). It applies to Courts Martial; when military, under the Army Act, 1881 (44 & 45 Vict. c. 58), s. 70, and S.R. & O. 1926, No. 989; when naval, under the Naval Discipline Act, 1866 (29 & 30 Vict. c. 109), s. 65, and S.R. & O. 1923, No. 1291; when relating to the Air Force, under the Air Force Act, 1917 (7 & 8 Geo. 5, c. 51), s. 12 and schedules thereto, and S.R. & O. 1920, No. 2004; and see the Army Act, 1881 (44 & 45 Vict. c. 58), s. 128, and Rules of Procedure, Nos. 73 (B.) and 80. It applies to criminal proceedings under the Summary Jurisdiction Acts: *Charnock v. Merchant*, [1900] 1 Q.B. 474. The enactments referred to in sect. 6 made accused persons, their wives and husbands, competent witnesses to different extents in different specified cases. They are now obsolete.

<sup>2</sup> Not if they are tried separately: *Winsor v. R.*, 1866, L.R. 1 Q.B. 390; *R. v. Bradlaugh*, 1883, 15 Cox, 217.

<sup>3</sup> *R. v. Payne*, 1872, L.R. 1 C.C.R. 349; and *R. v. Thompson*, 1872, *ibid.* 377.

<sup>4</sup> 61 & 62 Vict. c. 36, s. 1 (a), (c).

But the wife or husband of a person charged may be called as a witness either for the prosecution or defence, and without the consent of the person charged, if he is charged with—

- (1) An offence under any enactment mentioned in the footnote hereto;<sup>1</sup> or
- (2) An offence as to which the wife or husband of the person charged may by common law be called as a witness without his or her consent, *i.e.* an offence consisting of any bodily injury or violence inflicted on his or her wife or husband.<sup>2</sup>

In any such criminal proceeding against a husband or a wife, as is authorised by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75, ss. 12 and 16), the husband and wife respectively are competent and admissible wit-

<sup>1</sup> *Ibid.* ss. 1 (c) and 4 (1). The enactments referred to are set out in the Schedule to the Act and are—The Vagrancy Act, 1824 (5 Geo. 4, c. 83), relating to a man neglecting to maintain, or deserting his wife or any of his family; The Poor Law (Scotland) Act (8 & 9 Vict. c. 83), s. 80, relating to the like or neglect to maintain an illegitimate child; The Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 48 (rape), s. 52 (indecent assault on female), ss. 53-55 (abduction); The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 12 & 16, relating to offences by a married man or woman against his wife's or her husband's property; The Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69). By subsequent legislation the following enactments have been added to this list—The Incest Act, 1908 (8 Edw. 7, c. 45); The Criminal Justice Act, 1914 (4 & 5 Geo. 5, c. 50), s. 28 (3), relating to bigamy; The Air Force (Constitution) Act, 1917 (7 & 8 Geo. 5, c. 51); The Unemployment Insurance Act, 1920 (10 & 11 Geo. 5, c. 30), and subsequent amending Acts (by 12 Geo. 5, c. 7, s. 11); provisions relating to any offence under The Infant Life Preservation Act, 1929 (19 & 20 Geo. 5, c. 34); The Children and Young Persons Act, 1933 (23 Geo. 5, c. 12), s. 15, Sched. I., and s. 26 (5). For the contents of Sched. I see *P. 178*, n.

<sup>2</sup> *Ibid.* ss. 1 (c) and 4 (2). For a statement of the cases covered by the common law rule see *R. v. Wakefield*, 1827, 2 Lew. 287; *Reeve v. Wood*, 1864, 5 B. & S. 364, and *R. v. Lapworth*, [1931] 1 K.B. 117. Where the spouse is competent under the common law rule, he or she is also compellable; *R. v. Lapworth* (*supra*). But where the competency exists only in virtue of s. 4 (1) of the Act, the witness though competent, is not compellable; *Leach v. R.*, [1912] A.C. 305.

nesses, [and except when defendant compellable to give evidence.]<sup>1</sup>

The following proceedings at law are not criminal within the meaning of this Article:

Trials of indictments for the non-repair of public highways or bridges, or for nuisances to any public highway, river, or bridge;<sup>2</sup>

Proceedings instituted for the purpose of trying civil rights only;<sup>3</sup>

Proceedings on the Revenue side of the King's Bench Division of the High Court of Justice.<sup>4</sup>

## ARTICLE 118

### COMPETENCY IN PROCEEDING RELATING TO ADULTERY

In proceedings instituted in consequence of adultery, the parties and their husbands and wives are competent witnesses, but no witness in any such proceeding, whether a party to the suit or not, is liable to be asked or bound to answer any question tending to show that he or she has

<sup>1</sup> 47 Vict. c. 14, s. 1; see the case of *R. v. Brittleton*, 1884, 12 Q.B.D. 266, which occasioned this enactment. The following doubt arises as to its effect. Does it mean (a) only that the wife is competent as against the husband, and the husband as against the wife, notwithstanding their marriage, or (b) that in such cases not only the prosecutor, though married to the prisoner, but the prisoner, though prisoner and though married, is to be competent, though the prisoner is not to be compellable? It is observable that the first "husband and wife" does not become "wife or husband" before the word "respectively", as would have been natural. It is submitted that the judicial construction of s. 4 of the Act of 1898 (p. 144, n., *ante*) together with the general words of s. 6 of the Act (see *Charnock v. Merchant*, *ante*, p. 113, n.) have effected the repeal of the words enclosed in brackets.

<sup>2</sup> Evidence Act, 1877 (40 Vict. c. 14), s. 1. The Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 6, expressly saves the operation of this Act.

<sup>3</sup> See note 1, p. 143, *ante*.

<sup>4</sup> 28 & 29 Vict. c. 104, s. 34, referring to the Exchequer Division, subsequently abolished.

been guilty of adultery,<sup>1</sup> unless he or she has already given evidence in the same proceeding in disproof of the<sup>2</sup> alleged adultery.

### ARTICLE 119

#### COMMUNICATIONS DURING MARRIAGE<sup>3</sup>

No husband is compellable to disclose any communication made to him by his wife during the marriage, and no wife is compellable to disclose any communication made to her by her husband during the marriage.<sup>4</sup>

### ARTICLE 120 \*

#### JUDGES AND ADVOCATES PRIVILEGED AS TO CERTAIN QUESTIONS

It is doubtful whether a judge is compellable to testify as to anything which came to his knowledge in Court as such judge.<sup>5</sup> It seems that a barrister cannot be compelled

 *See Note 22*

<sup>1</sup> Supreme Court of Judicature Act, 1925, s. 198. See *post*, pp. 217-218. A witness who speaks to his own adultery, e.g. to show connivance, may be cross-examined on it (*Ruck v. Ruck & Croft*, [1931] P. 90).

<sup>2</sup> The party cannot be cross-examined as to adultery alleged against him or her in the pleadings but not expressly denied during examination-in-chief (*Morton v. Morton, Daly & McNaught*, [1937] P. 151).

<sup>3</sup> 16 & 17 Vict. c. 83, s. 3, and 61 & 62 Vict. c. 36, s. 1 (d). The privilege is purely the creature of statute (*Shenton v. Tyler*, [1939] 1 Ch. 620, C.A.).

<sup>4</sup> The doubt previously expressed by the author as to whether the privilege attached to a widower or divorced person questioned as to what had been communicated to him while it lasted has now been upheld by *Shenton v. Tyler*, (*supra*), which decides that there is no privilege in those circumstances.

<sup>5</sup> *R. v. Gazard*, 1838, 8 C. & P. 595. An arbitrator in a commercial case which is referred to an umpire is not disqualified from giving evidence before the umpire (*Bourgeois v. Weddell & Co.*, [1924] 1 K.B. 539). The question in this case was whether the arbitrator was competent, not whether he was compellable to be a witness. It appears that in com-

to testify as to what he said in Court in his character of a barrister.<sup>1</sup>

### ARTICLE 121

#### EVIDENCE AS TO AFFAIRS OF STATE AND PUBLIC AFFAIRS

No one can be compelled to give evidence relating to any affairs of State, or to any communication officially received by or from a public officer, unless the officer at the head of the department concerned permits him to do so;<sup>2</sup> or to give evidence of what took place in either House of Parliament, without leave of the House, though he may state that a particular person acted as Speaker.<sup>3</sup>

### ARTICLE 122

#### INFORMATION AS TO COMMISSION OF OFFENCES

In cases in which the Government is immediately concerned, no witness can be compelled to answer any question, the answer to which would tend to discover the names of persons by or to whom information was given as to the commission of offences.

A criminal prosecution by the Director of Public Prosecutions is a public prosecution, and the Director of Public Prosecutions cannot be required to say from whom he acquired information or what it was.<sup>4</sup>

mercial cases an arbitrator acts rather as an advocate than a judge. No suggestion is made in the case that one who has acted judicially is incompetent as a witness.

<sup>1</sup> *Curry v. Walter*, 1796, 1 Esp. 456.

<sup>2</sup> *Bealson v. Skene*, 1860, 5 H. & N. 838; *Asiatic Petroleum Coy. v. Anglo-Persian Oil Coy.*, [1916] 1 K.B. 822, where the communication was made to a private trading body; and see *Ankin v. L. & N.E.R. Co.*, [1930] 1 K.B. 527 (C.A.). *Quare*, are the public officers concerned only those employed by the Central Government?

<sup>3</sup> *Chubb v. Salomons*, 1852, 3 Car. & Kir. 77; *Plunkett v. Cobbett*, 1804, 5 Esp. 136.

<sup>4</sup> *Marks v. Beyfus*, 1890, 25 Q.B.D. 494.

In ordinary criminal prosecutions it is for the judge to decide whether the permission of any such question would or would not, under the circumstances of the particular case, be injurious to the administration of justice.<sup>1</sup>

### ARTICLE 123

#### COMPETENCY OF JURORS

A petty juror may not give evidence as to what passed between the jurymen in the discharge of their duties,<sup>2</sup> except as to matters taking place in open court.<sup>3</sup>

### ARTICLE 124

#### PROFESSIONAL COMMUNICATIONS<sup>4</sup>

No legal adviser is permitted, whether during or after the termination of his employment as such, unless with his client's express consent, to disclose any communication, oral or documentary, made to him as such legal adviser,<sup>5</sup> by or on behalf of his client, during, in the course, and for the purpose of his employment, whether in reference to any matter as to which a dispute has arisen or

<sup>1</sup> *R. v. Hardy*, 1794, 21 S.T. 811; *A. G. v. Bryant*, 1846, 15 M. & W. 169; *R. v. Richardson*, 1863, 3 F. & P. 693.

<sup>2</sup> *R. v. Thomas*, [1933] 2 K.B. 489. The Privy Council refused to follow this case in *Ras Behari Lal v. R.*, 1933, 102 L.J. (P.C.) 144, where also it was a question how far some jurors knew English, and suggested there must be some limit to its applicability. See, too, *Vaise v. Delaval*, 1785, 1 T.R. 11, and *Burgess v. Langley*, 1843, 5 M. & G. 722; and see *R. v. Armstrong*, [1922] 2 K.B. 555, for the reasons underlying the rule.

<sup>3</sup> *Ellis v. Deheer*, [1922] 2 K.B. 113 (C.A.).

<sup>4</sup> See *Taylor*, ss. 911-918 A.; *Best*, s. 581; *Phipson*, 196-204; *Halsbury*, xiii. pp. 725-727.

<sup>5</sup> As to the meaning to be attached to this phrase see *Minter v. Priest*, Illustration (a). The obligation is not mutual; the solicitor cannot prevent disclosure by the client. *Quare*, can one client prevent disclosure by another?

otherwise, or to disclose any advice given by him to his client during, in the course, and for the purpose of such employment. It is immaterial whether the client is or is not a party to the action in which the question is put to the legal adviser.

This Article does not extend to—

(1) Any such communication as aforesaid made in furtherance of any criminal or fraudulent purpose; whether such purpose was at the time of the communication known to the professional adviser or not;<sup>1</sup>

(2) Any fact observed by any legal adviser, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether his attention was directed to such fact by or on behalf of his client or not;

(3) Any fact with which such legal adviser became acquainted otherwise than in his character as such.

The expression “legal adviser” includes barristers and solicitors,<sup>2</sup> their clerks,<sup>3</sup> and interpreters between them and their clients. It does not include officers of a corporation through whom the corporation has elected to make statements.<sup>4</sup>

<sup>1</sup> *R. v. Cox & Railton*, 1884, 14 Q.B.D. 153. The judgment in this case is that of ten judges in the Court for Crown Cases Reserved, and examines minutely all the cases on the subject. These cases put the rule on the principle that the furtherance of a criminal purpose can never be part of a legal adviser's business. As soon as a legal adviser knowingly takes part in preparing for a crime, he ceases to act as a lawyer and becomes a criminal—a conspirator or accessory as the case may be. As to the effect of a fraudulent purpose see *O'Rourke v. Darbshire*, [1920] A.C. 581.

<sup>2</sup> *Wilson v. Rastall*, 1792, 4 T.R. 753. As to interpreters, *ibid.* 756.

<sup>3</sup> *Taylor v. Forster*, 1825, 2 C. & P. 195; *Foote v. Hayne*, 1824, 1 C. & P. 545. Quære, whether licensed conveyancers are within the rule? Parke, B., in *Turquand v. Knight*, 1836, 2 M. & W. at p. 100, thought not. Special pleaders would seem to be on the same footing.

<sup>4</sup> *Mayor of Swansea v. Quirk*, 1879, 5 C.P.D. 106. Nor pursuivants of the Heralds' College: *Slade v. Tucker*, 1880, 14 Ch.D. 824.

*Illustrations*

(a) A consults B, a solicitor, with the view of retaining his services. He does not retain them. All communications between A and B are protected from disclosure in favour of A.<sup>1</sup>

(b) A, being charged with embezzlement, retains B, a barrister, to defend him. In the course of the proceedings, B observes that an entry has been made in A's account book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of B's employment.

This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, is not protected from disclosure in a subsequent action by A against the prosecutor in the original case for malicious prosecution.<sup>2</sup>

(c) If a legal adviser witnesses a deed, he must give evidence as to what happened at the time of its execution.<sup>3</sup>

(d) A retains B, an attorney, to prosecute C (whose property he had fraudulently acquired) for murder, and says, "It is not proper for me to appear in the prosecution for fear of its hurting me in the cause coming on between myself and him; but I do not care if I give £10,000 to get him hanged, for then I shall be easy in my title and estate". This communication is not privileged.<sup>4</sup>

## ARTICLE 125

## CONFIDENTIAL COMMUNICATIONS WITH LEGAL ADVISERS

No one can be compelled to disclose to the Court any communication between himself and his legal adviser, which his legal adviser could not disclose without his permission, although it may have been made before any

<sup>1</sup> *Minter v. Priest*, [1930] A.C. 558.

<sup>2</sup> *Brown v. Foster*, 1857, 1 H. & N. 736.

<sup>3</sup> *Crawcour v. Salter*, 1881, 18 Ch.D. pp. 35-36.

<sup>4</sup> *Annesley v. Anglesea*, 1743, 17 S.T. 1223-1244.

dispute arose as to the matter referred to: <sup>1</sup> but communications between a third party and a legal adviser are not protected unless the third party is acting as the agent of the person seeking advice, or the communications are made in contemplation of litigation, or for the purpose of giving advice or obtaining evidence with reference to it.<sup>2</sup>

### ARTICLE 126 \*

#### CLERGYMEN AND MEDICAL MEN

Medical men <sup>3</sup> and [probably] clergymen may be compelled to disclose communications made to them in professional confidence.

### ARTICLE 127

#### PRODUCTION OF TITLE-DEEDS OF WITNESS NOT A PARTY

No witness who is not a party to a suit can be compelled to produce his title-deeds to any property,<sup>4</sup> or any document the production of which might tend to criminate him, or expose him to any penalty or forfeiture;<sup>5</sup> but a witness is not entitled to refuse to produce a document in his possession only because its production may expose him to a civil action,<sup>6</sup> or because he has lien upon it.<sup>7</sup>

\* See Note XXI.

<sup>1</sup> *Minet v. Morgan*, 1873, 8 Ch. App. 361, reviewing all the cases, and adopting the explanation given in *Pearse v. Pearse*, 1846, 1 De G. & S. 18-31, of *Radcliffe v. Fursman*, 1730, 2 Br. P.C. 514. An illustration will be found in *Mayor of Bristol v. Cox*, 1884, 26 Ch.D. 678.

<sup>2</sup> *Wheeler v. Le Marchant*, 1881, 17 Ch.D. 675. See, too, *Calcraft v. Guest*, [1898] 1 Q.B. 759.

<sup>3</sup> *Duchess of Kingston's Case*, 1776, 20 S.T. 572-573.

<sup>4</sup> *Pickering v. Noyes*, 1823, 1 B. & C. 263; *Adams v. Lloyd*, 1858, 3 H. & N. 351.

<sup>5</sup> *Whitaker v. Izod*, 1809, 2 Tav. 115.

<sup>6</sup> *Doe v. Date*, 1842, 3 Q.B. 609, 618.

<sup>7</sup> *Hope v. Liddell*, 1855, 7 De G. M. & G. 331; *Hunter v. Leathley*, 1830, 10 B. & C. 858; *Brassingon v. Brassington*, 1823, 1 Si. & Stu. 455. It

No bank is compellable to produce the books of such bank, except in the case provided for in Article 38.<sup>1</sup>

### ARTICLE 128

#### PRODUCTION OF DOCUMENTS WHICH ANOTHER PERSON, HAVING POSSESSION, COULD REFUSE TO PRODUCE

No solicitor,<sup>2</sup> trustee, or mortgagee can be compelled to produce (except for the purpose of identification) documents in his possession as such, which his client, *cestui que trust*, or mortgagor would be entitled to refuse to produce if they were in his possession; nor can any one who is entitled to refuse to produce a document be compelled to give oral evidence of its contents.<sup>3</sup>

### ARTICLE 129

#### WITNESS NOT TO BE COMPELLED TO CRIMINATE HIMSELF

No one is bound to answer<sup>4</sup> any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the witness for the wife or husband of the

has been doubted whether production may not be refused on the ground of a lien as against the party requiring the production. This is suggested in *Brassington v. Brassington*, and was acted upon by Lord Denman in *Kemp v. King*, 1842, 2 Mo. & Ro. 437; but it seems to be opposed to *Hunter v. Leathley*, 1830, 10 B. & C. 858, in which a broker who had a lien on a policy for premiums advanced was compelled to produce it in an action against the underwriter by the assured who had created the lien, Sec *Ley v. Barlow*, 1848 (per Parke, B.), 1 Ex. 801.

<sup>1</sup> Bankers' Books Evidence Act, 1879 (42 Vict. c. 11), ss. 6, 7.

<sup>2</sup> *Volant v. Soyer*, 1853, 13 C.B. 231; *Phelps v. Prew*, 1854, 3 E. & B. 431.

<sup>3</sup> *Davies v. Waters*, 1842, 9 M. & W. 608; *Few v. Guppy*, 1834, 13 Beav. 457.

<sup>4</sup> The question, however, may lawfully be put: *Boyle v. Wiseman*, 1855, 10 Ex. 647, 24 L.J. (Ex.) 160, and see *Wills*, p. 270. Cf. Article 58.

witness]<sup>1</sup> to any criminal charge,<sup>2</sup> or to any penalty<sup>3</sup> or forfeiture<sup>4</sup> which the judge regards as reasonably likely to be preferred or sued for;<sup>5</sup>

Provided that a person charged with an offence, and being a witness in pursuance of the Criminal Evidence Act, 1898, may be asked [and is bound to answer]<sup>6</sup> any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged;<sup>7</sup> and that

a person who is being examined as a debtor under sect. 15 of the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), is not entitled to refuse to answer questions put to him at his public examination on the ground that by so doing he may incriminate himself.<sup>8</sup>

But any statement made by the debtor in the course of such compulsory examination<sup>9</sup> is not admissible<sup>10</sup> as

<sup>1</sup> See per Baylcy, J., in *R. v. All Saints, Worcester*, 1817, 6 M. & S. 194; *Roscof*, 173.

<sup>2</sup> This does not now include the risk of bankruptcy proceedings: *Ex parte Haas*, [1902] 1 K.B. 98 (C.A.), nor adultery (*Blunt v. Park Lane Hotel*, [1942] 2 K.B. 253, C.A.), except as provided in Art. 118, p. 145.

<sup>3</sup> *Dandridge v. Corden*, 1827, 3 C. & P. 11, and for the analogous case of privilege in Discovery see *Hunnings v. Williamson*, 1883, 10 Q.B.D. 459.

<sup>4</sup> *Pye v. Butterfield*, 1864, 5 B. & S. 829, per Crompton, J., at p. 835, and see *The Witnesses Act*, 1806 (46 Geo. 3, c. 37), and Best, p. 115.

<sup>5</sup> This question is for the judge to decide: *R. v. Boyes*, 1861, 30 L.J., Q.B. 301, approved by the Court of Appeal in *Ex parte Reynolds*, 1882, 20 Ch.D. 294. In *Lamb v. Munster*, 1882, 10 Q.B.D. 110, the author who was party to the decision adopted the text of the Digest in his judgment.

<sup>6</sup> 61 & 62 Vict. c. 36, s. 1 (e). The words in brackets are not in the Act, but are plainly implied, and their presence may be inferred from s. 1 (f).

<sup>7</sup> A prisoner may be asked questions by another prisoner with whom he is being jointly tried, which tend to criminate him as to the offence with which they are jointly charged: *R. v. Rowland*, [1910] 1 K.B. 458.

<sup>8</sup> *In re Paget*, [1927] 2 Ch. 85, following *Re Atherton*, [1912] 2 K.B. 251.

<sup>9</sup> This does not include the debtor's statement of affairs: *R. v. Pike*, [1902] 1 K.B. 552; nor statements made on his preliminary examination: *R. v. Tuttle*, 1929, 28 Cox C.C. 610, and these remain admissible.

<sup>10</sup> As to offences under the Larceny Act, 1861, by the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 166, and as to offences under the Larceny Act, 1916, by s. 43 (3) of that Act. The Act of 1916 repealed

evidence upon his prosecution for any offence under ss. 75, 76, 82, 83, and 84 of the Larceny Act, 1861 (relating to frauds by agents, trustees, and bankers), or for any offence under ss. 6, 7 (1), 20, 21, and 22 of the Larceny Act, 1916 (relating to larceny of wills, fraudulent conversion, etc.).<sup>1</sup>

No one is excused from answering any question only because the answer may establish or tend to establish that he owes a debt or is otherwise liable to any civil suit either at the instance of the Crown or any other person.<sup>2</sup>

## ARTICLE 130

### CORROBORATION, WHEN REQUIRED<sup>3</sup>

No plaintiff in any action for breach of promise of marriage can recover a verdict, unless his or her testimony is corroborated by some other material evidence in support of such promise.<sup>4</sup> The fact that the defendant did not answer letters affirming that he had promised to marry the plaintiff is not such corroboration.<sup>5</sup>

No order against any person alleged to be the father of a bastard child can be made by any justices, or confirmed on appeal by any Court of Quarter Session, unless the evidence of the mother of the said bastard child is

some but not all of the material sections of the Act of 1861. A similar provision is contained in the Land Registration Act, 1925 (15 Geo. 5, c. 21), s. 119 (2).

<sup>1</sup> Besides the evidence obtained as above being excluded, the debtor is given immunity from prosecution under certain conditions in respect of offences under these sections disclosed in his examination; see s. 85 of the Larceny Act, 1861, and s. 43 (2) of the Larceny Act, 1916.

<sup>2</sup> The Witnesses Act, 1806 (46 Geo. 3, c. 37).

<sup>3</sup> This does not necessarily imply a second witness. Contrast the provisions of Article 132 (treason).

<sup>4</sup> 32 & 33 Vict. c. 68, s. 2.

<sup>5</sup> *Wiedemann v. Walpole*, [1891] 2 Q.B. 534 (C.A.).

corroborated in some material particular to the satisfaction of the said justices or Court respectively.<sup>1</sup>

No person can be convicted of any offence upon the unsworn evidence of a child of tender years, unless such unsworn evidence is corroborated by material evidence implicating the accused.<sup>2</sup>

When the only proof against a person charged with a criminal offence is the evidence of an accomplice, uncorroborated in any material particular, it is the duty of the judge to warn the jury that it is unsafe to convict any person upon such evidence, though they have a legal right to do so.<sup>3</sup>

If upon a trial for perjury the only evidence against the defendant is the oath of one witness contradicting the oath on which perjury is assigned, and if no circumstances are proved which corroborate such witness, the defendant is entitled to be acquitted.<sup>4</sup>

A person charged under the Road Traffic Act, 1930, with driving at a speed greater than the allowed maximum shall not be liable to be convicted solely on the evidence of one witness that in his opinion he was driving at such speed.<sup>5</sup>

<sup>1</sup> Bastardy Laws Amendment Act, 1872, s. 4; and, as to appeals, Bastardy Act, 1845, s. 6. See *Cole v. Manning*, 1877, 2 Q.B.D. 611; *Burbury v. Jackson*, [1917] 1 K.B. 16; *Mash v. Darley*, [1914] 3 K.B. 1226 (C.A.); and *Thomas v. Jones*, [1921] 1 K.B. 22.

<sup>2</sup> Children and Young Persons Act, 1933 (23 Geo. 5, c. 12), s. 38 (1). See also Article 134.

<sup>3</sup> Taylor, ss. 967-971; Russ. Cri. 2132-2137. See *R. v. Baskerville*, [1916] 2 K.B. 658, where the authorities on this point were fully considered by the Court of Criminal Appeal.

<sup>4</sup> Russ. Cri. 478, 2137, and see The Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), s. 13. See *R. v. Threlfall*, 1914, 10 Cr. App. Rep. 112, as to corroboration otherwise than by a second witness.

<sup>5</sup> The Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), s. 10 (3).

## ARTICLE 131

## CLAIM ON ESTATE OF DECEASED PERSON

Claims upon the estates of deceased persons, whether founded upon an allegation of debt or of gift, ought not to be maintained upon the uncorroborated testimony of the claimant, unless circumstances appear or are proved which make the claim antecedently probable, or throw the burden of disproving it on the representatives of the deceased.

*Illustrations*

(a) A, a widow, swore that her deceased husband gave her plate, etc., in his house, but no circumstances corroborated her allegation. Her claim was rejected.<sup>1</sup>

(b) A, a widow, claimed the rectification of a settlement drawn by her husband the night before their marriage, and giving him advantages which, as she swore, she did not mean to give him, and were not explained to her by him. The settlement was not one which, in the absence of agreement between the parties, would have been sanctioned by the Court. Her claim was admitted, though uncorroborated.<sup>2</sup>

## ARTICLE 132

## NUMBER OF WITNESSES

In trials for high treason, or misprision of treason, no one can be indicted, tried, or attainted (unless he pleads guilty) except upon the oath of two lawful witnesses,

<sup>1</sup> *Finch v. Finch*, 1883, 23 Ch.D. 267. See below.

<sup>2</sup> *Lovesy v. Smith*, 1880, 15 Ch.D. 655. *In re Garnett, Gandy v. Macaulay*, 1885, 31 Ch.D. 1, is a similar case. In *In re Hodgson, Beckett v. Ramsdale*, 1885, 31 Ch.D. 183, the language of Hannen, J., in words somewhat relaxes the rule, but not, I think, in substance. In *Rawlinson v. Scholes*, 1898, 79 L.T. 350, the Court held that *In re Hodgson* was inconsistent with *Finch v. Finch, ubi supra*, and that uncorroborated testimony if examined with care and suspicion might be accepted. The text of the Article is left as the author wrote it.

either both of them to the same overt act, or one of them to one and another of them to another overt act of the same treason. If two or more distinct treasons of divers heads or kinds are alleged in one indictment, one witness produced to prove one of the said treasons and another witness produced to prove another of the said treasons are not to be deemed to be two witnesses to the same treason within the meaning of this Article.<sup>1</sup>

This provision does not apply to cases of high treason in compassing or imagining the King's death, in which the overt act or overt acts of such treason alleged in the indictment are assassination or killing of the King, or any direct attempt against his life, or any direct attempt against his person, whereby his life may be endangered or his person suffer bodily harm,<sup>2</sup> or to misprision of such treason.

<sup>1</sup> The Treason Act, 1695 (7 & 8 Will. 3, c. 3), ss. 2, 4.

<sup>2</sup> The Treason Act, 1800 (39 & 40 Geo. 3, c. 93).

## CHAPTER XVI

### *OF TAKING ORAL EVIDENCE, AND OF THE EXAMINATION OF WITNESSES*

#### ARTICLE 133

##### *EVIDENCE TO BE UPON OATH, EXCEPT IN CERTAIN CASES*

ALL oral evidence given in any proceeding must be given upon oath,<sup>1</sup> except as is stated in this and the following article.

Every person objecting to being sworn, and stating, as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, may make his solemn affirmation, which is of the same force and effect as if he had taken the oath.

Such affirmation must be as follows:

“I, A. B., do solemnly, sincerely, and truly declare and affirm,”

and then proceed with the words of the oath prescribed by law, omitting any words of imprecation or calling to witness.<sup>2</sup>

Where an oath has been duly administered and taken, the fact that the person to whom the same was adminis-

<sup>1</sup> The form and manner of administration of oaths depends upon practice as modified by the Oaths Act, 1909 (9 Edw. 7, c. 39), s. 2, *q.v.*

<sup>2</sup> The Oaths Act, 1888 (51 & 52 Vict. c. 46), s. 2, which repeals the previous enactments on the subject; see The Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), s. 15 (1), as to the penalty for giving false evidence.

tered had, at the time of taking such oath, no religious belief, does not for any purpose affect the validity of such oath.<sup>1</sup>

#### ARTICLE 134

##### UNSWORN EVIDENCE OF YOUNG CHILD

In any proceeding for any offence<sup>2</sup> the evidence of any child of tender years who is tendered as a witness, and does not, in the opinion of the Court,<sup>3</sup> understand the nature of an oath, may be received, though not given upon oath, if, in the opinion of the Court, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

And the evidence of the child, though not given on oath, but otherwise taken and reduced into writing, in accordance with the provisions of sect. 17 of the Indictable Offences Act, 1848,<sup>4</sup> or of Part III of the Children and Young Persons Act, 1933, shall be deemed to be a deposition within the meaning of those sections respectively.

Provided that—

(1) A person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused; and

<sup>1</sup> The Oaths Act, 1888 (51 & 52 Vict. c. 46), s. 3.

<sup>2</sup> Children and Young Persons Act, 1933 (23 Geo. 5, c. 12), s. 38 (1), relating to criminal cases only. In civil cases the evidence of a child to be receivable must be on oath or affirmation and it must be ascertained that the child is competent to understand the nature of an oath. *R. v. Brasier*, 1779, 1 Leach C.C. 199; but see *Wills*, 125, n.

<sup>3</sup> The inquiries of the judge on this point (the *voire dire*) must be made in open court: *R. v. Dunne*, 1929, 99 L.J. (K.B.) 117.

<sup>4</sup> See Article 154.

(2) Any child whose evidence is received as aforesaid who wilfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, shall be liable on summary conviction to be dealt with as if he had been summarily convicted of an indictable offence punishable in the case of an adult with imprisonment.<sup>1</sup>

### ARTICLE 135

#### UNSWORN EVIDENCE OF A BARRISTER

A barrister giving evidence in Court, in proceedings where evidence is usually given by affidavit, as to his action in his professional capacity in previous proceedings, makes a statement from his seat in Court without an oath having been administered to him.<sup>2</sup>

### ARTICLE 136

#### FORM OF OATHS; BY WHOM THEY MAY BE ADMINISTERED

Oaths are binding which are administered in such form and with such ceremonies as the person sworn declares to be binding.<sup>3</sup>

Every person now or hereafter having authority by

<sup>1</sup> Children and Young Persons Act, 1933, *ibid.*, s. 38 (2).

<sup>2</sup> *Hickman v. Berens*, [1895] 2 Ch. p. 638, following the previous unreported case of *Kempshall v. Holland* (but see 98 L.T.Jo. p. 489, leading Article), decided in the Court of Appeal. In the former case the original proceedings took place before an official referee; in both the barrister's statement was in substitution for an affidavit. See Article 120 and Note XX.

<sup>3</sup> The Oaths Act, 1838 (1 & 2 Vict. c. 105), and The Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), s. 17. The oath is one taken as a jurymen, or "on appointment to any office or employment, or on any occasion whatever", a curious enactment.

law or by consent of parties to hear, receive and examine evidence, is empowered to administer an oath to all such witnesses as are lawfully called before him.<sup>1</sup>

### ARTICLE 137

#### HOW ORAL EVIDENCE MAY BE TAKEN

Oral evidence may be taken (according to the law relating to civil and criminal procedure)—

in open Court upon a final or preliminary hearing; and,

out of Court for future use in Court—

in civil matters,

(1) upon affidavit; <sup>2</sup>

(2) under a commission; <sup>3</sup>

(3) before an examiner, or in cases without the territorial jurisdiction of the United Kingdom before a special examiner of the Court, appointed under the Rules of the Supreme Court; <sup>4</sup>

(4) in cases without the territorial jurisdiction of the United Kingdom by Letters of Request; <sup>5</sup>

(5) in the cases and in the manner described in Article 158 (Merchant Shipping Act);

(6) in the cases and in the manner provided by the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 141, and Bankruptcy Rules, r. 66; or by the Companies (Winding up) Rules, 1929, r. 69;

and in criminal matters,

<sup>1</sup> Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 16.

<sup>2</sup> R.S.C.O. xxxvii, r. 1. Evidence Act, 1938, s. 5.

<sup>3</sup> *Ibid.* r. 6; this method is practically obsolete.

<sup>4</sup> *Ibid.* r. 5, and 6 c. As to affidavits abroad, see 52 Vict. c. 10 and O. xxxviii, r. 6.

<sup>5</sup> *Ibid.* r. 6 a and 6 b. See also Matrimonial Causes Rules, 1944, r. 25 (3).

(1) under the provisions of the Indictable Offences Act, 1848,<sup>1</sup> and the Criminal Justice Act, 1925, in those cases to which Article 154 applies;

(2) in the cases and in the manner mentioned in Articles 155-158 (inclusive).

Oral evidence taken in open Court must be taken according to the rules contained in this chapter relating to the examination of witnesses.

Oral evidence taken under a commission must be taken in the manner prescribed by the terms of the commission.<sup>2</sup>

Oral evidence taken under a commission or before an examiner must be taken in the same manner as if it were taken in open Court; but the examiner has no right to decide on the validity of objections taken to particular questions, but must record the questions, the fact that they were objected to, and the answers given.<sup>3</sup>

If secondary evidence of the contents of any document is not objected to on the taking of a commission, it cannot be objected to afterwards.<sup>4</sup>

Oral evidence given on affidavit must be confined to such facts as the witness is able of his own knowledge to prove, except in interlocutory matters, in which statements as to his belief and the grounds thereof may be admitted.<sup>5</sup> The costs of every affidavit unnecessarily setting forth matters of hearsay or argumentative matter,

<sup>1</sup> 11 & 12 Vict. c. 42, s. 17, and 15 & 16 Geo. 5, c. 86, s. 12. It seems to be the better opinion that justices sitting under the former Act are not sitting in open court; see note to s. 19 of the Act of 1848 in Stone's *Justices Manual*. It will be appreciated that the primary purpose of taking these depositions is not to provide evidence, and it is only in special circumstances that they can be used as such.

<sup>2</sup> Taylor, s. 513.

<sup>3</sup> *Ibid.*, s. 512.

<sup>4</sup> *Robinson v. Davies*, 1879, 5 Q.B.D.

<sup>5</sup> R.S.C. O. xxxviii, r. 3.

or copies of or extracts from documents, must be paid by the party filing them.

When a deposition, or the return to a commission, or an affidavit, or evidence taken before an examiner, is used in any court as evidence of the matter stated therein, the party against whom it is read may object to the reading of anything therein contained on any ground on which he might have objected to its being stated by a witness examined in open Court, provided that no one is entitled to object to the reading of any answer to any question asked by his own representative on the execution of a commission to take evidence.<sup>1</sup>

### ARTICLE 138

#### EXAMINATION IN CHIEF, CROSS-EXAMINATION, AND RE-EXAMINATION<sup>2</sup>

Witnesses examined in open Court must be first examined in chief, then cross-examined, and then re-examined.

Whenever any witness has been examined in chief, or has been intentionally<sup>3</sup> sworn, the opposite<sup>4</sup> party has a right to cross-examine him; but the opposite party is not entitled to cross-examine merely because a witness has been called to produce a document on a *subpoena duces tecum*, or in order to be identified. After the

<sup>1</sup> Taylor, s. 548. *Hutchinson v. Bernard*, 1836, 2 Moo. & Rob. 1.

<sup>2</sup> The matters referred to in this Article and Articles 139 and 140 are too much matters of common practice to need authority for the main principles laid down. See Taylor, s. 1404 *et seq.*; Roseoe, 166 *et seq.*; and Phipson, 449-467.

<sup>3</sup> See cases in Taylor, s. 1429.

<sup>4</sup> A person being tried on an indictment jointly with a witness giving evidence under the Criminal Evidence Act, 1898, may be an "opposite party", so as to have a right to cross-examine: *R. v. Hadwen*, [1902] 1 K.B. 882.

cross-examination is concluded, the party who called the witness has a right to re-examine him.

The Court may in all cases permit a witness to be recalled either for further examination in chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and further re-examination respectively.

\* If a witness dies, or becomes incapable of being further examined at any stage of his examination, the evidence given before he became incapable is good.<sup>1</sup>

If in the course of a trial a witness who was supposed to be competent appears to be incompetent, his evidence may be withdrawn from the jury, and the case may be left to their decision independently of it.<sup>2</sup>

#### ARTICLE 139

##### TO WHAT MATTERS CROSS-EXAMINATION AND RE-EXAMINATION MUST BE DIRECTED

The examination and cross-examination must relate to facts in issue or relevant or deemed to be relevant thereto, but the cross-examination need not be confined to the facts to which the witness testified on his examination in chief.

The re-examination must be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

<sup>1</sup> *R. v. Doolin*, 1832, 1 *Jebb*, C.C. 123. The judges compared the case to that of a dying declaration, which is admitted though there can be no cross-examination.

<sup>2</sup> *R. v. Whitehead*, 1866, 1 C.C.R. 33.

ARTICLE 140  
LEADING QUESTIONS

Questions suggesting the answer which the person putting the question wishes or expects to receive, or suggesting disputed facts as to which the witness is to testify, must not, if objected to by the adverse party, be asked in examination in chief, or in re-examination, except with the permission of the Court, but such questions may be asked in cross-examination.

ARTICLE 141 \*

QUESTIONS LAWFUL IN CROSS-EXAMINATION

When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend—

- (1) To test his accuracy, veracity, or credibility; or
- (2) To shake his credit, by injuring his character.

Provided that a person charged with a criminal offence and being a witness under the Criminal Evidence Act, 1898, may be cross-examined to the effect, and under the circumstances, described in Article 58.

Witnesses have been compelled to answer such questions, though the matter suggested was irrelevant to the matter in issue, and though the answer was disgraceful to the witness; but it is submitted that the Court has the right to exercise a discretion in such cases, and to refuse to compel such questions to be answered when the truth of the matter suggested would not in the opinion of the Court affect the credibility of the witness as to the matter to which he is required to testify.

\* See Note XXII.

In the case provided for in Article 129, a witness cannot be compelled to answer such a question.

*Illustration*

The question was, whether A committed perjury in swearing that he was R.T. B deposed that he made tattoo marks on the arm of R.T., which at the time of the trial were not and never had been on the arm of A. B was asked and was compelled to answer the question whether, many years after the alleged tattooing, and many years before the occasion on which he was examined, he committed adultery with the wife of one of his friends.<sup>1</sup>

ARTICLE 142

JUDGE'S DISCRETION AS TO CROSS-EXAMINATION TO  
CREDIT

The judge may in all cases disallow any questions put in cross-examination of any party or other witness which may appear to him [*i.e.* the judge] to be vexatious and not relevant to any matter proper to be inquired into in the cause or matter.<sup>2</sup>

ARTICLE 143

EXCLUSION OF EVIDENCE TO CONTRADICT ANSWERS  
TO QUESTIONS TESTING VERACITY

When a witness under cross-examination has been asked and has answered any question which is relevant

<sup>1</sup> *R. v. Orton*, 1874. See summing-up of Cockburn, C.J., vol. ii. p. 719, etc., of the reprint of the official transcript.

<sup>2</sup> R.S.C. O. xxxvi, r. 38. I leave Article 142 as it originally stood; because this Order is after all only an exception to the rule. "Him" must refer to the judge, as it would otherwise refer to the "party or other witness", which would be absurd. See also the rules laid down for the guidance of counsel by the Bar Council (Annual Statement, 1917, p. 7) quoted in the *Annual Practice for 1934*, Tit. Miscellaneous, p. 2627. The effect of these rules is given in Note XXII, *post*, p. 222.

to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence can be given to contradict him except in the following cases: <sup>1</sup>

(1) If a witness is asked whether he has been previously convicted of any felony or misdemeanour, and denies or does not admit it, or refuses to answer, evidence may be given of his previous conviction thereof.<sup>2</sup>

(2) If a witness is asked any question tending to show that he is not impartial, and answers it by denying the facts suggested, he may be contradicted.<sup>3</sup>

#### ARTICLE 144 \*

##### STATEMENTS INCONSISTENT WITH PRESENT TESTIMONY MAY BE PROVED

Every witness under cross-examination in any proceeding, civil or criminal, may be asked whether he has made any former statement relative to the subject-matter of the proceeding and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion, and if he does not distinctly admit that he has made such a statement, proof may be given that he did in fact make it.<sup>4</sup>

\* See Note XXIII.

<sup>1</sup> *A. G. v. Hitchcock*, 1847, 1 Ex. 91, pp. 99-105. See, too, *Palmer v. Trower*, 1852, 8 Ex. 247.

<sup>2</sup> The Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 6, re-enacting The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 25, now repealed.

<sup>3</sup> *A. G. v. Hitchcock*, 1847, 1 Ex. 91, pp. 100, 105; *R. v. Shaw*, 1888, 16 Cox, C.C. 503.

<sup>4</sup> The Criminal Procedure Act, 1865, s. 4, re-enacting The Common Law Procedure Act, 1854, s. 23, now repealed. As to whether the section in any way alters the common law, see Wills, 339.

## ARTICLE 145 \*

CROSS-EXAMINATION AS TO PREVIOUS STATEMENTS IN  
WRITING

A witness under cross-examination may be questioned as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the indictment or proceeding, without such writing being shown to him<sup>1</sup> [or 'being proved in the first instance']; but if it is intended to contradict him by [proving] the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of contradicting him. The judge may, at any time during the trial after the witness has denied what he is alleged to have stated in writing, require the document to be produced for his inspection, and may thereupon make such use of it for the purposes of the trial as he thinks fit.

## ARTICLE 146 \*

## IMPEACHING CREDIT OF WITNESS

The credit of any witness may be impeached by the opposite party, by the evidence of persons who swear that they, from their knowledge of the witness, believe him

\* See Note XXIII.

<sup>1</sup> This Article, giving the substance of s. 5 of the Criminal Procedure Act, 1865, and the preceding Article dealing with s. 4 of that Act appear superficially so similar as to be redundant. In reality, however, the two sections differ widely in origin and purpose. S. 4 merely declares the common law. S. 5 gets rid of the common law rule which required a party to disclose and prove the document by his own evidence or an admission before cross-examining his opponent on it, a requirement which seriously hampered effective cross-examination and was unfair to the witness; and see *North Australian Territory Co. v. Goldsborough*, [1893] 2 Ch. 381 (C.A.), per Lord Esher, M.R., at p. 386. See also Note XXIII, p. 225.

to be unworthy of credit upon his oath. Such persons may not upon their examination in chief give reasons for their belief, but they may be asked their reasons in cross-examination, and their answers cannot be contradicted.<sup>1</sup>

No such evidence may be given by the party by whom any witness is called,<sup>2</sup> but, when such evidence is given by the opposite party, the party who called the witness may give evidence in reply to show that the witness is worthy of credit.<sup>3</sup>

#### ARTICLE 147 \*

##### UNFAVOURABLE AND HOSTILE WITNESSES

If a witness called by a party to prove a particular fact in issue or relevant to the issue fails to prove such fact or proves an opposite fact the party calling him may contradict him by calling other evidence,<sup>4</sup> and is not thereby precluded from relying on those parts of such witness's evidence as he does not contradict.<sup>5</sup>

If a witness appears to the judge<sup>6</sup> to be hostile to the party calling him, that is to say, not desirous of telling the truth to the Court at the instance of the party calling

\* See Note XIV.

<sup>1</sup> *Taylor*, 1470, 1470A. See *R. v. Brown*, 1867, L.R. 1 C.C.R. 70.

<sup>2</sup> The Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 3.

<sup>3</sup> *Archbold*, 483.

<sup>4</sup> *Greenough v. Eccles*, 1859, 5 C.B. (N.S.) 786; 28 L.J. (C.P.) 160. This right is independent of the judge's discretion mentioned in the Criminal Procedure Act, 1865, s. 3; see per Cockburn, L.C.J., in this case. See Note XXIII.

<sup>5</sup> *Bradley v. Ricardo*, 1831, 8 Bing. 57. If a party calls two equally credible witnesses who give evidence the tenor of which he might reasonably have expected, upon a major fact in issue, and such witnesses directly contradict each other, the party calling them is not entitled to accredit the one and discredit the other, and the testimony of both must be disregarded. Per Hamilton, J. (Lord Sumner), in *Sumner & Leivesley v. John Brown & Co.*, 1909, 25 T.L.R. 745.

<sup>6</sup> The judge's decision is not open to review. *Rice v. Howard*, 1886, 16 Q.B.D. 681.

him, the judge may in his discretion permit his examination by such party to be conducted in the manner of a cross-examination to the extent to which the judge considers necessary for the purpose of doing justice.<sup>1</sup>

Such a witness may by leave of the judge be cross-examined as to—

- (1) facts in issue or relevant or deemed to be relevant to the issue;<sup>2</sup>
- (2) matters affecting his accuracy, veracity, or credibility in the particular circumstances of the case;<sup>3</sup> and as to
- (3) whether he has made any former statement, oral or written, relative to the subject-matter of the proceeding, and inconsistent with his present testimony.<sup>4</sup>

But such witness may not be asked questions by the party calling him in order to shake his credit by injuring his character, as by showing that he has a bad character or has previously been convicted of any offence not relevant to the issue.<sup>5</sup>

In the case of a witness who is treated as hostile,<sup>6</sup> proof of former statements, oral or written, made by him in-

<sup>1</sup> Per Abbott, C.J., in *Bastin v. Carew*, 1824, Ry. & Mo. 127, approved by the Court of Appeal in *Price v. Manning*, 1889, 42 Ch.D. 372.

<sup>2</sup> *Price v. Manning* (*supra*). This case also decides that a party's opponent is not necessarily a hostile witness.

<sup>3</sup> Per Erle, J., in *Melhuish v. Collier*, 1850, 15 Q.B. 878, at p. 890.

<sup>4</sup> The Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 4. Only s. 3 in that Act refers in terms to "adverse" (see below) witnesses; but it is presumed that ss. 4 and 5 dealing with cross-examination are applicable to this Article also. It is to be observed that by the terms of the Act it is not necessary to designate the occasion of the statement, or to draw the witness's attention to the fact of the writing, unless it is intended to prove them in contradiction to his answer.

<sup>5</sup> See Buller's N.P. (7th ed., 1817), p. 297, for the reason underlying this rule, and see Article 146.

<sup>6</sup> Criminal Procedure Act, 1865, s. 3. The actual word used in the section is "adverse" but it was decided in *Greenhough v. Eccles* (*supra*) that it bears the meaning "hostile".

consistent with his present testimony may by leave of the judge be given in accordance with Articles 144 and 145.<sup>1</sup>

A party is not permitted to call evidence with a view to impeach the general credit of a witness whom he has himself called by showing that he has a bad character or has previously been convicted of any offence not relevant to the issue.<sup>2</sup>

### ARTICLE 148.

#### OFFENCES AGAINST WOMEN

When a man is prosecuted for rape or for indecent assault, it may be shown that the woman against whom the offence was committed was of a generally immoral character, although she is not cross-examined on the subject.<sup>3</sup> The woman may in such a case be asked whether she has had connection with other men, but her answer cannot be contradicted.<sup>4</sup> She may also be asked whether she has had connection on other occasions with the prisoner, and if she denies it she may be contradicted.<sup>5</sup>

### ARTICLE 149

#### WHAT MATTERS MAY BE PROVED IN REFERENCE TO DECLARATIONS RELEVANT UNDER ARTICLES 26-33

Whenever any declaration or statement made by a deceased person relevant or deemed to be relevant under

<sup>1</sup> Such statements are not evidence of the truth of what they state, but are relevant only to the credit of the witness: *Melhuish v. Collier (supra)*, and see *R. v. Russell*, Illustration (a), Article 15, p. 28.

<sup>2</sup> See Buller's N.P. (7th ed., 1817), p. 297, for the reason underlying this rule, and see Article 146.

<sup>3</sup> *R. v. Clarke*, 1817, 2 Star. 241.

<sup>4</sup> *R. v. Holmes*, 1871, 1 C.C.R. 334.

<sup>5</sup> *R. v. Martin*, 1834, 6 C. & P. 562, and remarks in *R. v. Holmes*, p. 337, per Kelly, C.B. See also *R. v. Cockroft*, 1870, 11 Cox 410, 41 L.J. (M.C.) 10, and *R. v. Riley*, 1887, 18 Q.B.D. 481.

Articles 26-33, both inclusive, or any deposition is proved, all matters may be proved in order to contradict it, or in order to impeach or confirm the credit of the person by whom it was made which might have been proved if that person had been called as a witness, and had denied upon cross-examination the truth of the matter suggested.<sup>1</sup>

#### ARTICLE 150

##### REFRESHING MEMORY

A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the judge considers it likely that the transaction was at that time fresh in his memory.

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.<sup>2</sup>

An expert may refresh his memory by reference to professional treatises.<sup>3</sup>

#### ARTICLE 151

##### RIGHT OF ADVERSE PARTY AS TO WRITING USED TO REFRESH MEMORY

Any writing referred to under the preceding Article must be produced and shown to the opposite party if

<sup>1</sup> *R. v. Drummond*, 1784, 1 Lea. 337; *R. v. Pike*, 1829, 3 C. & P. 598. In these cases dying declarations were excluded, because the persons by whom they were made would have been incompetent as witnesses, but the principle would obviously apply to all the cases in question.

<sup>2</sup> Taylor, ss. 1406-1413; Roscoe, 181-182; Phipson, 454.

<sup>3</sup> *Sussex Peerage Case*, 1844, 11 C. & F. 114-117.

he requires it; and such party may, if he pleases, cross-examine the witness thereupon.<sup>1</sup>

### ARTICLE 152

#### GIVING, AS EVIDENCE, DOCUMENT CALLED FOR AND PRODUCED ON NOTICE

When a party calls for a document which he has given the other party notice to produce, and such document is produced to and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so, and if it is or is deemed to be relevant.<sup>2</sup>

### ARTICLE 153

#### USING, AS EVIDENCE, A DOCUMENT PRODUCTION OF WHICH WAS REFUSED ON NOTICE

When a party refuses to produce a document which he has had notice to produce, he may not afterwards use the document as evidence without the consent of the other party.<sup>3</sup>

<sup>1</sup> See cases in *Roscoe*, 176.

<sup>2</sup> *Wharam v. Routledge*, 1805, 5 Esp. 235; *Calvert v. Flower*, 1836, 7 C. & P. 386.

<sup>3</sup> *Doe v. Hodgson*, 1840, 12 A. & E. 135. See *Wills*, 361.

## CHAPTER XVII

### *OF DEPOSITIONS<sup>1</sup>*

#### ARTICLE 154

##### DEPOSITIONS BEFORE MAGISTRATES

A DEPOSITION taken under the Indictable Offences Act, 1848, s. 17,<sup>2</sup> may without further proof be read as evidence on the trial of the person in respect of a charge against whom the examining justices have examined witnesses, whether the trial is for the offence charged before the magistrates, or for any other offence arising out of the same transaction, or set of circumstances as that offence, on the following conditions being satisfied:

(a) the deposition must be the deposition either of a witness whose attendance at the trial is stated to be unnecessary in accordance with the provisions of the Criminal Justice Act, 1925, s. 13 (1), or of a witness who is proved to the satisfaction of the judge at the trial by the oath of a credible witness to be dead or insane, or so ill as not to be able to travel,<sup>3</sup> or to be kept out of the way by means of the procurement of the accused or on his behalf; and,

<sup>1</sup> The list of depositions mentioned in this chapter gives the principal instances of such provisions but does not claim to be exhaustive. As to impeaching the credit of a deponent, see Article 149.

<sup>2</sup> 11 & 12 Vict. c. 42, as modified by the Criminal Justice Act, 1925 (15 & 16 Geo. 5, c. 86) s. 12. See also p. 162, n.

<sup>3</sup> Although there may be a prospect of his recovery: *R. v. Stephenson*, 1862, L. & C. 165. If there is a prospect of the recovery of a witness proved to be too ill to travel, the judge is not obliged to receive the deposition, but may postpone the trial: *R. v. Tait*, 1861, 2 F. & F. 553.

(b) it must be proved [to the satisfaction of the judge] at the trial, either by a certificate purporting to be signed by the justice before whom the deposition purports to have been taken, or by the clerk to the examining justices, or by the oath of a credible witness, that the deposition was taken in the presence of the accused, and that the accused or his counsel or solicitor had full opportunity of cross-examining the witness; and,

(c) the deposition must purport to be signed by the justice before whom it purports to have been taken:

Provided that the foregoing provisions shall not have any effect in any case in which it is proved

(i) that the deposition, or where the proof required by paragraph (b) above is given by means of a certificate, that the certificate was not in fact signed by the justice by whom it purports to be signed, or

(ii) where the deposition is the deposition of a witness whose attendance at the trial is stated to be unnecessary as aforesaid, that the witness has been duly notified that he is required to attend the trial.<sup>1</sup>

## ARTICLE 155

### DEPOSITIONS FOR THE PERPETUATION OF TESTIMONY

A deposition taken for the perpetuation of testimony in criminal cases, under the Criminal Law Amendment Act, 1867,<sup>2</sup> s. 6, may be produced and read<sup>3</sup> as evidence,

<sup>1</sup> 15 & 16 Geo. 5, c. 86, s. 13 (3). The words in brackets are covered by Article 105 (facts showing admissibility are for judge).

<sup>2</sup> 30 & 31 Vict. c. 35, s. 6. For the Perpetuation of Testimony in certain civil cases see R.S.C. O. xxxvii, rr. 35-38.

<sup>3</sup> If the judge is of opinion that the witness may recover he is not obliged to receive the deposition but may postpone the trial: *R. v. Tait*, 1861, 2 F. & F. 553.

either for or against the accused, upon the trial of any offender or offence to which it relates—

if the deponent is proved to be dead, or

if it is proved that there is no reasonable probability that the deponent will ever be able to travel or to give evidence, and

if the deposition purports to be signed by the justice by or before whom it purports to be taken, and

if it is proved to the satisfaction of the Court that reasonable notice in writing<sup>1</sup> of the intention to take such deposition was served upon the person (whether prosecutor or accused) against whom it was proposed to be read, and

that such person or his counsel or attorney had or might have had, if he had chosen to be present, full opportunity of cross-examining the deponent.<sup>2</sup>

## ARTICLE 156

### DEPOSITIONS UNDER THE FOREIGN JURISDICTION ACT, 1890<sup>3</sup>

Where a person is charged with an offence cognisable by a British Court in a foreign country and is liable to be sent for trial to any British possession, he may, before being so sent for trial, tender for examination to the

<sup>1</sup> *R. v. Shurmer*, 1886, 17 Q.B.D. 323; *R. v. Harris*, 1918, 82 J.P. 196.

<sup>2</sup> The section is very long, and as the first part of it belongs rather to the subject of criminal procedure than to the subject of evidence, I have omitted it. The language is slightly altered. I have not referred to depositions taken before a coroner (see 50 & 51 Vict. c. 71, s. 4), because the section says nothing about the conditions on which they may be given in evidence. The relevancy, therefore, depends on the common law principles expressed in Article 33. They must be signed by the coroner; but these are matters not of evidence, but of criminal procedure.

<sup>3</sup> 53 & 54 Vict. c. 37, s. 6.

Court in the foreign country any competent witness whose evidence he deems material for his defence, and whom he alleges himself unable to produce at the trial in the British possession;

and the Court in the foreign country shall proceed in the examination and cross-examination of the witness as though he had been tendered at a trial before that Court, and shall cause the evidence so taken to be reduced into writing, and shall transmit to the Criminal Court of the British possession a copy thereof certified as correct under the seal of the Court before which it was taken, or the signature of the judge of that Court;

and thereupon the Court of the British possession before which the trial takes place shall allow so much of the evidence so taken as would have been admissible according to the law and practice of that Court, had the witness been produced and examined at the trial, to be read and received as legal evidence at the trial.

## ARTICLE 157

### DEPOSITIONS OF A CHILD OR YOUNG PERSON<sup>1</sup>

Where in any proceedings in respect of any of the offences mentioned in the First Schedule to the Children and Young Persons Act, 1933, the Court is satisfied by the evidence of a registered medical practitioner that the attendance before the Court of any child in respect of whom the offence is alleged to have been committed would involve serious danger to its life or health, any deposition of the child taken under the Indictable Offences Act, 1848

<sup>1</sup> In this Article "child" means a person under the age of fourteen years, "young person" means a person who has attained the age of fourteen years and is under the age of seventeen years: Children and Young Persons Act, 1933 (23 Geo. 5, c. 12), s. 107.

(see Article 154), or pursuant to Part III of the Children and Young Persons Act, 1933, is admissible without further proof thereof—

(a) if it purports to be signed by the justice by or before whom it purports to be taken; and

(b) if it is proved that reasonable notice of the intention to take the deposition has been served upon the person against whom it is proposed to use it as evidence, and that that person or his counsel or solicitor had, or might have had if he had chosen to be present, an opportunity of cross-examining the child or young person making the deposition.<sup>1</sup>

A deposition pursuant to Part III of the Children and Young Persons Act, 1933, may lawfully be taken under the following conditions:

Where a justice is satisfied by the evidence of a duly qualified medical practitioner that the attendance before a Court of any child or young person in respect of whom an offence<sup>2</sup> mentioned in the First Schedule to the Children and Young Persons Act, 1933, is alleged to have been committed, would involve serious danger to his life or health, the justice may take in writing the deposition of the child or young person on oath, and shall thereupon subscribe the same, and add thereto a statement of his reason for taking the same, and of the day when and place where the same was taken, and of the names of the

<sup>1</sup> Children and Young Persons Act, 1933, s. 43.

<sup>2</sup> These offences are murder, manslaughter or infanticide of a child or young person; offences under the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), ss. 27, 55, 56; offences committed against children or young persons under the same Act, ss. 5, 42, 43, 52, 62; any offence under the Criminal Law Amendment Act, 1885; any offence in respect of a child or young person under the Incest Act, 1908 (8 Ed. 7, c. 45); any offence under the Children and Young Persons Act, 1933, ss. 1, 2, 3, 4, 11, 23; and any offence involving bodily injury to a child or young person.

persons (if any) present at the taking thereof. The justice taking any such deposition shall transmit the same with his statement—(a) if the deposition relates to an offence for which any accused person is already committed for trial, to the proper officers of the Court, for trial at which the accused person has been committed; and (b) in any other case to the clerk of the peace of the county or borough in which the deposition has been taken.<sup>1</sup>

The deposition of the child referred to in this Article need not be taken on oath in the case mentioned in Article 134.

#### ARTICLE 158

##### DEPOSITIONS UNDER MERCHANT SHIPPING ACT, 1894<sup>1</sup>

Whenever, in the course of any legal proceedings instituted in any part of His Majesty's dominions before any judge or magistrate or before any person authorised by law or by consent of parties to receive evidence, the testimony of any witness is required in relation to the subject-matter of that proceeding, any deposition that such witness may have previously made on oath in relation to the same subject-matter before any justice or magistrate in His Majesty's dominions or any British consular officer elsewhere is admissible in evidence, subject to the following restrictions:

(i) If such proceeding is instituted in the United Kingdom or British possessions, due proof must be given that such witness cannot be found in that kingdom or possession respectively.

<sup>1</sup> Children and Young Persons Act, 1933 (23 Geo. 5, c. 12), s. 42.

<sup>2</sup> 57 & 58 Vict. c. 60, s. 691. These depositions can be used both in civil and in criminal proceedings. In civil cases they are receivable notwithstanding that the opposite party or his legal adviser was not present and could not have cross-examined.

(2) If such deposition was made in the United Kingdom, it is not admissible in any proceeding instituted in the United Kingdom.

(3) If the deposition was made in any British possession, it is not admissible in any proceeding instituted in that British possession.

(4) If the proceeding is criminal the deposition is admissible unless it was made in the presence of the person accused.

A deposition so made must be authenticated by the signature of the judge, magistrate, or consular officer before whom it was made, and he must certify (if the case so requires) that the accused was present at the taking thereof.

It is not necessary in any case to prove the signature or the official character of the person appearing to have signed any such deposition; and in any criminal proceeding the certificate aforesaid is (unless the contrary is proved) sufficient evidence of the accused having been present in manner thereby certified.

Nothing in this article contained affects any provision by Parliament or by any local legislature as to the admissibility of depositions or the practice of any Court according to which depositions not so authenticated are admissible as evidence.

## CHAPTER XVIII

### *OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE*

#### ARTICLE 159

A NEW trial will not be granted in any civil action on the ground of the improper admission or rejection of evidence, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action.<sup>1</sup>

If in a criminal case evidence is improperly rejected or admitted, there is no remedy unless the prisoner is convicted.

An appeal on the ground of misreception or misrejection of evidence may be dismissed by the Court of Criminal Appeal if they consider that no substantial miscarriage of justice has actually occurred.<sup>2</sup>

A further appeal lies to the House of Lords from any decision of a point of law by the Court of Criminal Appeal, upon the certificate of the Attorney-General that such further appeal is desirable in the public interest.<sup>3</sup>

<sup>1</sup> R.S.C. O. xxxix, r. 6.

<sup>2</sup> The Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 4 (1).

<sup>3</sup> *Ibid.* s. 1 (6).



## NOTES



## NOTE I

### (TO ARTICLE 10, CONDUCT AND COMPLAINTS IN CRIMINAL CASES)

THE law relating to complaints in criminal cases is in an unsatisfactory condition, but it is hoped that it is correctly set out in Article 10. The necessity for exceptional treatment of complaints in the case of rape and similar offences was recognised by Hale (1 P.C. 663). In modern times in *R. v. Walker*, 1839, 3 M. & R. 312, when the charge was an assault with intent to rape, Parke, B., excluded a statement made by the woman, but he said, "The sense of the thing certainly is, that the jury should in the first instance know the nature of the complaint made by the prosecutrix, and all that she then said. But for reasons which I could never understand the usage has obtained that the prosecutrix's counsel should only inquire generally whether a complaint was made by the prosecutrix of the prisoner's conduct towards her, leaving the prisoner's counsel to bring before the jury the particulars of that complaint by cross-examination". Later Willes, J., ruled that the particulars of the complaint could be proved, vouching Parke, B. as his authority. This rule was followed by Lord Bramwell during the latter part of his career as a puisne judge; by Stephen, J., A. L. Smith, M.R., when he was a puisne judge, and Cave, J.

Later the matter was fully considered in two cases. The earlier was *R. v. Lillyman*, [1896] 2 Q.B. 167. In this case the count on which Lillyman was substantially tried, and upon which alone (*ibid.* at p. 170) he was con-

victed, charged that he unlawfully attempted to have carnal knowledge of a girl under sixteen and over thirteen. The question of her consent was therefore immaterial (Criminal Law Amendment Act, 1885, s. 5, by which the offence was created). In giving her evidence, however, the girl asserted that she did not consent to the attempt. Sir Henry Hawkins admitted evidence of the terms of a complaint made by the girl to her mistress, in the absence of the prisoner, very shortly after the commission of the acts charged. The prisoner was convicted, and the case was reserved on the question whether this evidence was admissible. The Court (Lord Russell, C.J., Pollock, B., Hawkins, Cave, and Wills, JJ.) affirmed the conviction. The ground of the decision is clearly stated in two passages of the judgment of the Court, delivered by Sir Henry Hawkins. "It [the complaint] is clearly not admissible as evidence of the facts complained of. . . . The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as being inconsistent with her consent to that of which she complains" (*ibid.* at p. 170). "The evidence is admissible only upon the ground that it was a complaint of that which is charged against the prisoner, and can be legitimately used only for the purpose of enabling the jury to judge for themselves whether the conduct of the woman was consistent with her testimony on oath given in the witness-box negativing her consent, and affirming that the acts complained of were against her will, and in accordance with the conduct they would expect in a truthful woman under the circumstances detailed by her" (*ibid.* at p. 177). In other words, the judgment decides that where a woman has made a statement as to her own consent, which in the case before

the Court happened to be perfectly irrelevant, the details of her complaint may be admitted only because they may serve as a test of the credibility which ought to attach to the relevant parts of her testimony.

This curious qualification of the admissibility of the terms of the complaint was generally ignored in practice between 1897 and 1905, and in the latter year was to a considerable extent explained away by the judgment (delivered by Ridley, J.) of the Court for Crown Causes Reserved (Lord Alverstone, C.J., Kennedy, Ridley, Channell, and Phillimore, JJ.) in *R. v. Osborne*, [1905] 1 K.B. 551. In this case the charge was one of indecent assault, with a second count for common assault, and the prosecutrix was under thirteen, so that on the first count, upon which in substance Osborne was tried, her consent was immaterial. The judgment points out that the reasoning of the judgment in *R. v. Lillyman* applies "equally to other parts of the story", besides the allegation of want of consent. Unless this were so, "it seems illogical to allow" the evidence held in Lillyman's case to have been rightly admitted. "In accordance with principle such complaints are admissible, not merely as negativing consent, but because they are consistent with the story of the prosecutrix."

The judgment of the Court expressly declares that the question of the admissibility of the terms of the complaint was not raised by the case as stated. It concludes, however, by saying that such evidence should only be given in "causes of this kind", *i.e.* sexual offences. But the preceding passage refers to evidence of the terms of the complaint (as opposed to the mere fact of its having been made) in reference to the ordinary case of rape. It is difficult to suppose that the Court intended to interfere with the established rule that evidence of the

fact of the complaint being made (but not of its terms) is admissible in all cases, civil or criminal, involving personal violence, whether sexual or not. Wills, p. 350, regards it as "doubtful" whether the cases of *Lillyman* and *Osborne* have rendered such evidence inadmissible. The general rule for criminal cases has been thus stated in *R. v. Osborne*: "In all ordinary cases, indeed, the principle must be observed which rejects statements made by any one in the prisoner's absence. Charges of this kind form an exceptional class, and in them such statements ought, under proper safeguards, to be admitted."

This decision has been treated as giving authoritative confirmation to the practice whereby, in all cases of rape and similar offences, evidence of the making of complaints, and of the terms in which they were made, is held generally to be admissible, if the complaints were made reasonably soon after the alleged offence, and not "elicited" by leading questions.

It has never been suggested that the *terms* of a complaint made in cases other than those in which a sexual offence is charged can be admitted for any purpose. Logically it seems difficult to distinguish complaints in sexual cases from complaints in, say, assault or robbery, in which they would be likely to be made.

## NOTE II

(TO ARTICLES 11-13.—RELEVANCE OF SIMILAR  
FACTS, SYSTEM, ETC.)

Article 11 is equivalent to the maxim, "Res inter alios acta alteri nocere non debet", which is explained and commented on in Best, ss. 506-510 (though I should

scarcely adopt his explanation of it), and by Broom (*Maxims*, 8th ed., 748-761). The application of the maxim to the Law of Evidence is obscure, because it does not show how unconnected transactions should be supposed to be relevant to each other. The meaning of the rule must be inferred from the exceptions to it stated in Articles 12 and 13, which show that it means, You are not to draw inferences from one transaction to another which is not specifically connected with it merely because the two resemble each other. They must be linked together by the chain of cause and effect in some assignable way before you can draw your inference.

In its literal sense the maxim also fails, because it is not true that a man cannot be affected by transactions to which he is not a party. Illustrations to the contrary are obvious and innumerable; bankruptcy, marriage, indeed every transaction of life, would supply them.

The exceptions to the rule given in Articles 12 and 13 are generalised from the cases referred to in the Illustrations. It is important to observe that though the rule is expressed shortly, and is sparingly illustrated, it is of very much greater importance and more frequent application than the exceptions. It is indeed one of the most characteristic and distinctive parts of the English Law of Evidence, for this is the rule which prevents a man charged with a particular offence from having either to submit to imputations which in many cases would be fatal to him, or else to defend every action of his whole life in order to explain his conduct on the particular occasion. A statement of the Law of Evidence which did not give due prominence to the four great exclusive rules of evidence of which this is one, would neither represent the existing law fairly nor in my judgment improve it.

The exceptions to the rule apply more frequently to criminal than to civil proceedings, and in criminal cases the Courts are always disinclined to run the risk of prejudicing the prisoner by permitting matters to be proved which tend to show in general that he is a bad man, and so likely to commit a crime.

Since the author wrote this note the "disinclination" mentioned above, though continuously asserted, has steadily become less effectual. The present position is set out by Lord Sumner in *Thompson v. Director of Public Prosecutions*, [1918] A.C. 221 at p. 232, where he says, "No one doubts that it does not tend to prove a man guilty of a particular crime to show that he is the kind of man who would commit a crime, or that he is generally disposed to crime and even to a particular crime; but sometimes for one reason, sometimes for another, evidence is admissible, notwithstanding that its general character is to show that the accused had in him the making of a criminal, for example in proving guilty knowledge, or intent or system, or in rebutting an appearance of innocence which, unexplained, the facts might bear. In cases of coining, uttering, procuring abortion, demanding by mcnaces, false pretences, and sundry species of frauds such evidence is constantly and properly admitted. Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant. The mere theory that a plea of Not Guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defences in order to rebut

them at the outset with some damning piece of prejudice." See on this point generally, Taylor ss. 346-348; Phipson, 158, 169-180; Halsbury, xiii. pp. 567-571.

### NOTE III

#### (TO ARTICLE 15.—HEARSAY)

The unsatisfactory character of some of the definitions of hearsay is well known, see Best, s. 495, Taylor, ss. 567-570, and Phipson, 218-224. The doctrine of hearsay evidence was fully discussed by many of the judges in *Wright v. Doe d. Tatham*, 1837, on the different occasions when that case came before the Court; see 7 A. & E. 313-408; 4 Bing. N.C. 489-573. The question was whether letters addressed to a deceased testator, implying that the writers thought him sane, but not acted upon by him, could be regarded as relevant to his sanity, which was the point in issue. The case sets the stringency of the rule against hearsay in a light which is forcibly illustrated by a passage in the judgment of Baron Parke (7 A. & E. 385-388), to the following effect: He treats the letters as "statements of the writers, not on oath, of the truth of the matter in question, with this in addition, that they had acted upon the statements on the faith of their being true by their sending the letters to the testator". He then goes through a variety of illustrations which had been suggested in argument, and shows that in no case ought such statements to be regarded as relevant to the truth of the matter stated, even when the circumstances were such as to give the strongest possible guarantee that such statements expressed the honest opinions of the persons who made them. Amongst others he mentions the following: "The conduct of the family or relations of a testator

taking the same precautions in his absence as if he were a lunatic—his election in his absence to some high and responsible office; the conduct of a physician who permitted a will to be executed by a sick testator; the conduct of a deceased captain on a question of seaworthiness, who, after examining every part of a vessel, embarked in it with his family; all these, when deliberately considered, are, with reference to the matter in issue in each case, mere instances of hearsay evidence—mere statements, not on oath, but applied in or vouched by the actual conduct of persons by whose acts the litigant parties are not to be bound". All these matters are therefore to be treated as irrelevant to the questions at issue.

These observations make the rule quite distinct, but the reason given for them, that hearsay is excluded because no one "ought to be bound by the act of a stranger", appears to be weak. It would be easy to suggest many cases in which hearsay would be relevant to a high degree under any definition of that word; and it may be supposed that the cases of *Stobart v. Dryden* and *Sturla v. Freccia*, quoted as illustrations to Article 15, would have been more satisfactorily tried had the decisions in those cases been the other way. But the prevailing rule must be taken as a case in which practical considerations are allowed to outweigh the principles dealing with relevancy. These may be taken to be chiefly that a statement made by an absent person cannot be tested by cross-examination of that person; that very few people can be trusted to repeat a statement they have heard in any but the very simplest cases; that admission of hearsay would open an easy way to fraud, and would often prolong proceedings by the production of relevant but unimportant matter in a way which would cloud the real issues.

The rule is an example of the principle governing the Law of Evidence generally, that only the Best Evidence is admissible. So, if a person who is not a party to the case in hand said anything relevant to the issue, he can be called as a witness, and subject to exceptions, secondary evidence of what he said is not admitted. But this rule does not cover the whole law, for if a person who made a statement is dead the evidence of the person to whom it was made becomes the best evidence of the statement, and yet it does not on that account become admissible. How far the exceptions have restricted the rule need not be considered, for, founded as they are on practical convenience, they can only be classified as exceptions.

It is thus possible to discuss the law as to hearsay either as a question of Relevancy or as a question of Proof, in answer to the question how relevant facts may be proved; see Phipson, 221-222. In this work it is treated in the former way because it is convenient to mention the chief exception to the rule about relevancy in connection therewith; and also to distinguish between admissions, confessions, and the matters dealt with in the rest of Part I, which are admissible because of the circumstances under which the statements referred to were made, from the contents of Part III, which deal with the Production and Effect of Evidence, which is inevitably connected with Procedure.

#### NOTE IV

##### (TO ARTICLE 16.—ADMISSIONS)

This definition is intended to exclude admissions by pleading, admissions which, if so pleaded, amount to estoppels, and admissions made for the purposes of a cause by the parties or their solicitors. These subjects are

usually treated of by writers on evidence; but they appear, to me to belong to other departments of the law. The subject, including the matter which I omit, is treated at length in Taylor, ss. 723-861; and Phipson, 221-254. A vast variety of cases upon admissions of every sort may be found by referring to Roscoe (Index, under the word "Admissions"). It may perhaps be well to observe that when an admission is contained in a document, or series of documents, or when it forms part of a discourse or conversation, so much and no more of the document, series of documents, discourse or conversation, must be proved as is necessary for the full understanding of the admission, but the judge or jury may of course attach degrees of credit to different parts of the matter proved. This rule is elaborately discussed and illustrated by Mr. Taylor, ss. 725-738. It has lost much of the importance which attached to it when parties to actions could not be witnesses, but could be compelled to make admissions by bills of discovery.

It is to be noticed that it is immaterial *to whom* statements mentioned in Section I are made: on the other hand, the number of persons *by whom* they can be made may vary from one to an unlimited number. Thus, some statements can only be made by one person. These are: confessions which must be made by the party charged (Article 22); dying declarations, by the victim of murder or manslaughter (Article 27); declarations as to the contents of a will, by a deceased testator (Article 30). Others, though they may be made by more than one, are confined to a limited class of persons. Thus, admissions may be made by parties, their agents and privies (Article 17); declarations as to pedigree may be made by a member of the pedigree or a person indicated in Article 32 (2). In

other cases no qualifications are needed in respect of the person of the declarant. Declarations as to public rights can be made by anyone subject to the judge's discretion (Article 31). In the cases of a declaration in the course of business made by a deceased person whose duty it was to make it (Article 28) and a declaration against his interest made by a deceased person (Article 29), anyone, including a complete stranger to the subject-matter of the litigation, is eligible to be a declarant. It is further to be noticed that declarations against interest differ from admissions not only in that the former are made by deceased and the latter by living persons but also in that the matter opposed to interest, the presence of which renders the statement admissible, must in the case of admissions be something in issue or relevant to the issue but need have no connection with the issue in the case of declarations against interest. (See Illustration (a) to Article 29.)

#### NOTE V

##### (TO ARTICLE 23.—CONFessions UNDER THREAT)

Many cases have been decided as to language which amounts to an inducement to confess. The earlier cases are, for practical purposes, summed up in *R. v. Baldry*, 1852, 2 Den. 430; 21 L.J. (M.C.) 130, which is also the authority for the last lines in the first paragraph of this Article, and in *R. v. Thompson*, [1893] 2 Q.B. 12. It is not easy to reconcile them. In *R. v. Baldry* the constable told the prisoner that he need not say anything to exonerate himself, but that what he did say would be taken down and used as evidence against him. It was held that this was not an inducement, though there were earlier cases which treated it as such. In *R. v. Jarvis*, 1867,

1 C.C.R. 96, the following was held not to be an inducement: "I think it is right I should tell you that besides being in the presence of my brother and myself (the prisoner's master) you are in the presence of two officers of the police, and I should advise you that to any question that may be put to you, you will answer truthfully, so that if you have committed a fault you may not add to it by stating what is untrue. Take care. We know more than you think we know." The words "you had better" were not used in this case. The judges intimated that if they had been, their decision would have been against admitting the confession. So, in *R. v. Fennell*, 1881, 7 Q.B.D. 147, "The inspector tells me you are making housebreaking implements; if that is so, you had better tell the truth, it may be better for you", was held to exclude the confession which followed. On the other hand, in *R. v. Reeve*, 1872, 1 C.C.R., the words "you had better, as good boys, tell the truth" were held not to render the confession inadmissible. But it may be doubted whether this case would now be applied generally; see Archbold, p. 392. In *Ibrahim v. R.*, [1914] A.C. 599 at pp. 609-612, the Privy Council (per Lord Sumner) reviewed in detail the decisions dealing with questions put by police officers and other persons officially in authority, and finished by a reference to *R. v. Booth & Jones*, 1910, 5, Cr. App. Rep. 177 at p. 179. In this case Channel, J., laid down that there is no actual authority that if a policeman does ask a question after he has made up his mind to charge the prisoner the answer to it is inadmissible; what happens is that the judge says it is not advisable to press the matter, and Darling, J., in the Court of Criminal Appeal observed that "the principle was put very clearly by Channel, J.". .

Rules for the guidance of the police when endeavouring to discover the author of a crime were approved by the Judges of the King's Bench Division in 1912. See Archbold, 29 ed. p. 394. They cannot of course be taken as altering the law as stated in Articles 23 and 25; see *R. v. Voisin*, [1918] 1 K.B. 531 at p. 539.

#### NOTE VI

##### (TO ARTICLE 29.—ADMISSIONS AS TO TITHES AND MODUSES)

A class of cases exists which I have not put into the form of an article, partly because their occurrence since the commutation of tithes must be very rare, and partly because I find a great difficulty in understanding the place which the rule established by them ought to occupy in a systematic statement of the law. They are cases which lay down the rule that statements as to the receipts of tithes and moduses made by deceased rectors and other ecclesiastical corporations sole are admissible in favour of their successors. There is no doubt as to the rule (see, in particular, *Short v. Lee*, 1821, 2 Jac. & Wil. 464; and *Young v. Clare Hall*, 1851, 17 Q.B. 529). The difficulty is to see why it was ever regarded as an exception. It falls directly within the principle stated in the text, and would appear to be an obvious illustration of it; but in many cases it has been declared to be anomalous, inasmuch as it enables a predecessor in title to make evidence in favour of his successor. This suggests that Article 29 ought to be limited by a proviso that a declaration against interest is not relevant if it was made by a predecessor in title of the person who seeks to prove it, unless it is a declaration by an ecclesiastical corporation sole, or a member of an

ecclesiastical corporation aggregate (see *Short v. Lee*), as to the receipt of a tithe or modus.

Some countenance for such a proviso may be found in the terms in which Bayley, J., states the rule in *Gleadow v. Atkin* (*ante*, p. 44), and in the circumstance that when it first obtained currency the parties to an action were not competent witnesses. But the rule as to the indorsement of notes, bonds, etc., is distinctly opposed to such a view.

#### NOTE VII

##### (TO ARTICLE 31.—DECLARATIONS AS TO PUBLIC AND GENERAL RIGHTS)

A great number of cases have been decided as to the particular documents, etc., which fall within the rule given in the text. They are collected in the works referred to on p. 48, n. They appear to me merely to illustrate one or other of the branches of the rule, and not to extend or vary it. An award, e.g., is not within the last branch of Illustration (b), because it "is but the opinion of the arbitrator, not upon his own knowledge" (*Evans v. Rees*, 1839, 10 A. & E. 155); but the detailed application of such a rule as this is better learnt by experience, applied to a firm grasp of principle, than by an attempt to recollect innumerable cases.

The case of *Weeks v. Sparke* (*ante*, p. 48) is remarkable for the light it throws on the history of the Law of Evidence. It was decided in 1813, and contains *inter alia* the following curious remarks by Lord Ellenborough: "It is stated to be the habit and practice of different circuits to admit this species of evidence upon such a question as the present. That certainly cannot make the law, but it shows at least, from the established practice of a large branch

of the profession, and of the judges who have presided at various times on those circuits, what has been the prevailing opinion upon this subject amongst so large a class of persons interested in the due administration of the law. It is stated to have been the practice both of the Northern and Western Circuits. My learned predecessor, Lord Kenyon, certainly held a different opinion, the practice of the Oxford Circuit, of which he was a member, being different." So in the *Berkeley Peerage Case*, 1811, Lord Eldon said: "When it was proposed to read this deposition as a declaration, the Attorney-General (Sir Vicary Gibbs) flatly objected to it. *He spoke quite right as a Western Circuiteer*, of what he had often heard laid down in the West, and never heard doubted" (4 *Cam.* 20). This shows how very modern much of the Law of Evidence is. Le Blanc, J., in *Weeks v. Sparke*, says that a foundation must be laid for evidence of this sort "by acts of enjoyment within living memory". This seems superfluous, as no jury would ever find that a public right of way existed, which had not been used in living memory, on the strength of a report that some deceased person had said that there once was such a right.

#### NOTE VIII

(TO ARTICLE 33.—EVIDENCE IN FORMER PROCEEDINGS)

In reference to this subject it has been asked whether this principle applies indiscriminately to all kinds of evidence in all cases. Suppose a man were to be tried twice upon the same facts—*e.g.* for robbery after an acquittal for murder—and suppose that in the interval between the two trials an important witness who had not been called

before the magistrates were to dic, might his evidence be read on the second trial from a reporter's shorthand notes? This case might easily have occurred if Orton had been put on his trial for forgery as well as for perjury. I should be disposed to think on principle that such evidence would be admissible, though I cannot cite any authority on the subject. The common law principle on which depositions taken before magistrates and in Chancery proceedings were admitted seems to cover the case.

#### NOTE IX

##### (TO ARTICLES 40-48.—JUDGMENTS AS EVIDENCE)

The law relating to the relevancy of judgments of Courts of Justice to the existence of the matters which they assert is made to appear extremely complicated by the manner in which it is usually dealt with. The method commonly employed is to mix up the question of the effect of judgments of various kinds with that of their admissibility, subjects which appear to belong to different branches of the law.

Thus the subject, as commonly treated, introduces into the Law of Evidence an attempt to distinguish between judgments *in rem* and judgments *in personam* or *inter partes* (terms adapted from, but not belonging to, Roman Law, and never clearly defined in reference to our own or any other system); also the question of the effect of the pleas of *autrefois acquit* and *autrefois convict*, which clearly belong not to evidence but to criminal procedure; the question of estoppels, which belongs rather to the law of pleading than to that of evidence; and the question of the effect given to the judgments of foreign Courts of Justice, which would seem more properly to belong to

private international law. See Taylor, ss. 1667-1723; Best, ss. 588-595; Phipson, 404-430; Halsbury, xiii. pp. 685-686, and the note to the Duchess of Kingston's Case, 1776, 2 Sm. L.C. 644.

The text is confined to as complete a statement as I could make of the principles which regulate the relevancy of judgments considered as declarations proving the facts which they assert, whatever may be the effect or the use to be made of those facts when proved. Thus the leading principle stated in Article 41 is equally true of all judgments alike. Every judgment, whether it be *in rem* or *inter partes*, must and does prove what it actually effects, though the effects of different sorts of judgments differ as widely as the effects of different sorts of deeds.

There has been much controversy as to the extent to which effect ought to be given to the judgments of foreign Courts in this country, and as to the cases in which the Courts will refuse to act upon them; but as a mere question of evidence they do not differ from English judgments. See Article 48.

#### NOTE X

(To CHAPTER VI.—CHARACTER WHEN RELEVANT)

The admissibility of evidence of character is considered at length in *R. v. Rowton*, 1865, 1 L. & C. 520; 34 L.J. (M.C.) 57, mentioned in note 1, p. 77. Of this case the author wrote: "One consequence of the view taken in that case is that a witness may with perfect truth swear that a man, who to his knowledge has been a receiver of stolen goods for years, has an excellent character for honesty, if he has the good luck to conceal his crimes from his neighbours. It is the essence of successful hypocrisy to combine a good reputation with a bad disposition, and according

to *R. v. Rowton* the reputation is the important matter. The case is seldom if ever acted on in practice. The question always put to a witness to character is: What is the prisoner's character for honesty, morality or humanity? as the case may be. It would not be an easy matter to make the common run of witnesses understand the distinction." And for an interesting illustration of this point see per Blackburn, J., in *R. v. Rowton*, 34 L.J. (M.C.) 57 at p. 58.

In Archbold's *Criminal Pleading*, 29 ed. p. 367, it is stated on the authority of *R. v. Gadbury*, 1838, 8 C.P. 676, and *R. v. Shrimpton*, 1851, 2 Den. 319, that if the prisoner endeavours to establish his good character by calling witnesses himself; or by cross-examining witnesses for the prosecution, the prosecution is at liberty, "in most cases", to give proof of previous convictions; and in *R. v. Redd*, [1923] 1 K.B. 104 at p. 106, Avory, J., expressed an opinion that this statement was correct. In that case, however, the prosecution confined themselves to asking questions about previous convictions as opposed to proving them affirmatively, and it is not easy to see how the statement in Archbold could apply to the case. It is also to be noted that the case of *R. v. Hodgkiss*, 1836, 7 C. & P., which covers what was there done, was not cited to the Court. The statement in Archbold hardly does justice to the fact that both the cases cited were decided in accordance with the special procedure laid down in 6 & 7 Will. 4, c. III, being cases where previous convictions were charged in the indictment under the Criminal Law Act, 1827 (7 & 8 Geo. 4, c. 28). Archbold's work, following the decision in *R. v. Rowton* (*ubi supra*), states that general evidence of good character may be rebutted by evidence of bad character. But the evidence of bad character given

in rebuttal must be as general as the evidence of good character, as is shown in the judgment of Cockburn, L.C.J., in *R. v. Rowton*, and this excludes evidence of previous convictions where it is not authorised by statute. The statement in Russell on *Crimes*, 8th ed., 1923, at p. 1958, to the same effect as Archbold and citing the same authorities, seems equally open to criticism. See generally: Taylor, ss. 349-363; Best, ss. 257-263; Russ. Cr. 1955-1959; Phipson, 181-187; Halsbury, xiii. ss. 642-643.

#### NOTE XI

(To ARTICLE 61.—JUDICIAL NOTICE)

The list of matters judicially noticed in this article is not intended to be quite complete. Further details will be found in Taylor, ss. 4-21; Roscoe, 82-87; and Phipson, 18-26. It may be doubted whether an absolutely complete list could be formed, as it is practically impossible to enumerate everything which is so notorious in itself, or so distinctly recorded by public authority, that it would be superfluous to prove it.

#### NOTE XII

(To ARTICLE 65.—ORAL EVIDENCE MUST BE DIRECT)

Owing to the ambiguity of the word "evidence", which is sometimes used to signify the effect of a fact when proved, and sometimes to signify the testimony by which a fact is proved, the expression "hearsay is no evidence" has many meanings. Its common and most important meaning is the one given in Article 15, which might be otherwise expressed by saying that the connection be-

tween events, and reports that they have happened, is generally so remote that it is expedient to regard the existence of the reports as irrelevant to the occurrence of the events, except in excepted cases. Article 65 expresses the same thing from a different point of view, and is subject to no exceptions whatever. It asserts that whatever may be the relation of a fact to be proved to the fact in issue, it must, if proved by oral evidence, be proved by direct evidence. For instance, if it were to be proved under Article 32 that A, who died fifty years ago, said that he had heard from his father B, who died 100 years ago, that A's grandfather C had told B that D, C's elder brother, died without issue, A's statement must be proved by someone who, with his own ears, heard him make it. If (as in the case of verbal slander) the speaking of the words was the very point in issue, they must be proved in precisely the same way. Cases in which evidence is given of character and general opinion may perhaps seem to be exceptions to this rule, but they are not so. When a man swears that another has a good character, he means that he has heard many people, though he does not particularly recollect what people, speak well of him, though he does not recollect all that they said.

Closely connected with the rule set out in Article 65 is the distinction often made in criminal cases between "direct" and "circumstantial" evidence. The former means evidence that the accused was seen committing the crime with which he is charged; that is, evidence of the fact in issue. The latter means evidence of facts from which, taken alone or in conjunction with others, the commission of the crime by the accused may be inferred; that is, evidence of facts relevant to the issue. Except that the meaning so attached to "direct" is not

that attached to it in the rule referred to, which is always absolute, the distinction is only a loose paraphrase of the law stated in Article 2. But it lends itself, in popular language at least, to the assumption that "direct" is in itself better than "circumstantial" evidence. This is of course not the case. Each class of evidence must be judged of on its own merits. A is charged with burglary in B's house. B saw a man, whom he does not identify as A, take a silver cup from its place in his dining-room by night, and escape by an open window. His evidence is "direct", and proves that a felony was committed; it fails in bringing home the crime to A. C, to whom A is well known, was watching outside B's house. He saw A leave the house; he arrested him and found B's cup in his possession; he found the window had been forced open. His evidence is "circumstantial" but, if believed, conclusive. Whether evidence is "direct" or "circumstantial" is therefore in itself no test of its value. And it is to be observed that evidence in cases of theft or involving dishonesty is far more often "circumstantial" than "direct", and that in cases such as forgery or false accountancy "direct" evidence is not likely to be forthcoming except from an accomplice. On the other hand, while facts in issue, the subject-matter of "direct evidence", must always be strictly limited in number and comparatively simple to prove, facts relevant to the issue, the subject-matter of "circumstantial evidence", may be practically infinite in number and of any degree of cogency. Modern developments of police advocacy, illustrated in such cases as *R. v. Crippen*, [1911] 1 K.B. 149, or *R. v. Brown & Kennedy*, Apr. 1928 (*Notable British Trials*), show to what lengths "circumstantial" evidence can go, and the difficulties in

which a profusion of it may place both judge and jury. But these difficulties turn on questions of fact rather than on points of law.

Whatever importance may be attached to the phrase, it is embedded in English law, and still more in popular speech. It has been perpetuated by Wills on *Circumstantial Evidence*, written in 1836 by Mr. William Wills, the "Low Bailiff" of Birmingham before the town was incorporated, a man of great experience and learning, and edited in 1902 by Mr. Justice Wills after a lifetime spent largely in the administration of the criminal law. It stands half-way between the works of earlier and more modern critics, and is a mine of learning and information collected by two generations of acute and diligent observers. Modern authorities on the subject are Taylor, ss. 63-66; Best, s. 92, ss. 293 ff.; Phipson, 3, 655.

### NOTE XIII

(TO ARTICLES 69 AND 70.—PROOF OF EXECUTION OF  
ATTTESTED DOCUMENT)

This is probably the most ancient, and is, as far as it extends, the most inflexible of all the rules of evidence. The following characteristic observations by Lord Ellenborough occur in *R. v. Harringworth*, 1815, 4 M. & S. at p. 353:

"The rule, therefore, is universal that you must first call the subscribing witness; and it is not to be varied in each particular case by trying whether, in its application, it may not be productive of some inconvenience, for then there would be no such thing as a general rule. *A lawyer who is well stored with these rules would be no better than any other man that is without them*, if by mere force of

speculative reasoning it might be shown that the application of such and such a rule would be productive of such and such an inconvenience, and therefore ought not to prevail; but if any general rule ought to prevail, this is certainly one that is as fixed, formal, and universal as any that can be stated in a Court of Justice."

In *Whyman v. Garth*, 1853, 8 Ex. at p. 807, Pollock, C.B., said, "The parties are supposed to have agreed *inter se* that the deed shall not be given in evidence without his [the attesting witness] being called to depose to the circumstances attending its execution".

In very ancient times, when the jury were witnesses as to matter of fact, the attesting witnesses to deeds (if a deed came in question) would seem to have been summoned with, and to have acted as a sort of assessors to, the jury. See as to this, Bracton, fo. 38a; Fortescue, *De Laudibus*, ch. xxxii. with Selden's note; and cases collected from the Year Books in Brooke's Abridgement, tit. *Testmoignes*.

This formalism has now been practically abolished by the Evidence Act, 1938.

#### NOTE XIV

(To ARTICLE 97.—DOCUMENTS EXCLUSIVE EVIDENCE)

The distinction between this and the following Article is, that Article 97 defines the cases in which documents are exclusive evidence of the transactions which they embody, while Article 98 deals with the interpretation of documents by oral evidence. The two subjects are so closely connected together that they are not usually treated as distinct; but they are so in fact. A and B make a contract of marine insurance on goods, and reduce it to writing. They verbally agree that the goods are not to be shipped in a particular ship, though the contract makes

no such reservation. They leave unnoticed a condition usually understood in the business of insurance, and they make use of a technical expression, the meaning of which is not commonly known. The law does not permit oral evidence to be given of the exception as to the particular ship. It does permit oral evidence to be given to annex the condition; and thus far it decides that for one purpose the document shall, and that for another it shall not, be regarded as exclusive evidence of the terms of the actual agreement between the parties! It also allows the technical term to be explained, and in doing so it interprets the meaning of the document itself. The two operations are obviously different, and their proper performance depends upon different principles. The first depends upon the principle that the object of reducing transactions to a written form is to take security against bad faith or bad memory, for which reason a writing is presumed as a general rule to embody the final and considered determination of the parties to it. The second depends on a consideration of the imperfections of language, and of the inadequate manner in which people adjust their words to the facts to which they apply!

The rules themselves are not, I think, difficult either to state, to understand, or to remember; but they are by no means easy to apply, inasmuch as from the nature of the case an enormous number of transactions fall close on one side or the other of most of them. Hence the exposition of these rules, and the abridgment of all the illustrations of them which have occurred in practice, occupy a very large space in the different text writers. They will be found in Taylor, ss. 1128-1228; Best, ss. 226-229; Roscoe, 15-34 (an immense list of cases); Phipson, 552; Halsbury, xiii. pp. 713-717.

----- which is founded on the case of

*Coss v. Lord Nugent*, it is to be observed that the paragraph is purposely so drawn as not to touch the question of the effect of the Statute of Frauds, now represented by (*inter alia*) the Sale of Goods Act, 1893, s. 4. It was held in *Coss v. Lord Nugent*, quoted on p. 115, that if by reason of the Statute of Frauds the substituted contract could not be enforced, it would not have the effect of waiving part of the original contract. But it has now been decided in *Morris v. Baron*, [1918] A.C. 1, that a contract in writing and signed by the party to be charged may be abrogated by a parol contract when the parties purport to rescind it, though the law laid down in *Coss v. Lord Nugent* still holds as to mere variation of the earlier contract.

The cases given in the illustrations will be found to mark sufficiently the various rules stated. As to paragraph (5), a very large collection of cases will be found in the notes to *Wigglesworth v. Dallison*, 1779, 1 S.L.C. 597, but the consideration of them appears to belong rather to mercantile law than to the Law of Evidence. For instance, the question what stipulations are consistent with, and what are contradictory to, the contract formed by subscribing a bill of exchange, or the contract between an insurer and an underwriter, are not questions of the Law of Evidence.

#### NOTE XV

##### (To ARTICLE 98.—ORAL INTERPRETATION OF DOCUMENTS)

Perhaps the subject-matter of this Article does not fall strictly within the Law of Evidence, but it is generally considered to do so; and as it has always been treated as a branch of the subject, I have thought it best to deal with it.

The general authorities for the propositions in the text are the same as those specified in the last note; but the great authority on the subject is the work of Vice-Chancellor Wigram on *Extrinsic Evidence*. Article 98, indeed, will be found, on examination, to differ from the six propositions of Vice-Chancellor Wigram only in its arrangement and form of expression, and in the fact that it is not restricted to wills. It will, I think, be found, on examination, that every case cited by the Vice-Chancellor might be used as an illustration of one or the other of the propositions contained in it.

It is difficult to justify the line drawn between the rule as to cases in which evidence of expressions of intention is admitted and cases in which it is rejected (paragraph 7, Illustrations (l) to (o), and paragraph 8, Illustrations (p) to (s)). When placed side by side, such cases as *Doe v. Hiscocks* (Illustration (m)) and *Doe v. Needs* (Illustration (h)) produce a singular effect. The vagueness of the distinction between them is indicated by the case of *Charter v. Charter*, 1871, L.R. 2 P. & D. 315. In this case the testator Forster Charter appointed "my son Forster Charter" his executor. He had two sons, William Forster Charter and Charles Charter, and many circumstances pointed to the conclusion that the person whom the testator wished to be his executor was Charles Charter. Lord Penzance not only admitted evidence of all the circumstances of the case, but expressed an opinion (p. 319) that, if it were necessary, evidence of declarations of intention might be admitted under the rule laid down by Lord Abinger in *Doe v. Hiscocks*, because part of the language employed ("my son — Charter") applied correctly to each son, and the remainder, "Forster", to neither. This mode of construing the rule would admit

evidence of declarations of intention both in cases falling under paragraph 8 and in cases falling under paragraph 7, which is inconsistent not only with the reasoning in the judgment, but with the actual decision in *Doe v. Hiscocks*. It is also inconsistent with the principles of the judgment in the later case of *Allgood v. Blake*, 1873, L.R. 8 Ex. 160, where the rule is stated by Blackburn, J., as follows: "In construing a will, the Court is entitled to put itself in the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used the words in the will, and then to declare what is the intention evidenced by the words used with reference to those facts and circumstances which were (or ought to have been) in the mind of the testator when he used those words". After quoting Wigram on *Extrinsic Evidence*, and *Doe v. Hiscocks*, he adds: "No doubt, in many cases the testator has, for the moment, forgotten or overlooked the material facts and circumstances which he well knew. And the consequence sometimes is that he uses words which express an intention which he would not have wished to express, and would have altered if he had been reminded of the facts and circumstances. But the Court is to construe the will as made by the testator, not to make a will for him; and therefore it is bound to execute his expressed intention, even if there is great reason to believe that he has by blunder expressed what he did not mean." The part of Lord Penzance's judgment above referred to was unanimously overruled in the House of Lords; though the Court, being equally divided as to the construction of the will, refused to reverse the judgment, upon the principle *praesumitur pro negante*.

Conclusive as the authorities upon the subject are, it

may not, perhaps, be presumptuous to express a doubt whether the conflict between a natural wish to fulfil the intention which the testator would have formed if he had recollected all the circumstances of the case; the wish to avoid the evil of permitting written instruments to be varied by oral evidence; and the wish to give effect to wills, has not produced in practice an illogical compromise. The strictly logical course, I think, would be either to admit declarations of intention both in cases falling under paragraph 7 and in cases falling under paragraph 8, or to exclude such evidence in both classes of cases, and to hold void for uncertainty every bequest or devise which was shown to be uncertain in its application to facts. Such a decision as that in *Stringer v. Gardiner* (see illustration (o)), the result of which was to give a legacy to a person whom the testator had no wish to benefit, and who was not either named or described in his will, appears to me to be a practical refutation of the principle or rule on which it is based.

Of course every document whatever must to some extent be interpreted by circumstances. However accurate and detailed a description of things and persons may be, oral evidence is always wanted to show that persons and things answering the description exist; and therefore in every case whatever, every fact must be allowed to be proved to which the document does, or probably may, refer; but if more evidence than this is admitted, if the Court may look at circumstances which affect the probability that the testator would form this intention or that, why should declarations of intention be excluded? If the question is, "What did the testator say?" why should the Court look at the circumstances that he lived with Charles and was on bad terms with William? How

can any amount of evidence to show that the testator intended to write "Charles" show that what he did write means "Charles"? To say that "Forster" means "Charles" is like saying that "two" means "three". If the question is, "What did the testator wish?" why should the Court refuse to look at his declarations of intention? And what third question can be asked? The only one which can be suggested is, "What would the testator have meant if he had deliberately used unmeaning words?" The only answer to this would be, he would have had no meaning, and would have said nothing, and his bequest should be *pro tanto* void.

#### NOTE XVI

##### (To CHAPTER XIII.—BURDEN OF PROOF)

In this and the following chapter many matters usually introduced into a treatise on evidence are omitted, because they appear to belong either to the subject of pleading or to different branches of Substantive Law. For instance, the rules as to the burden of proof of negative averments in criminal cases belong rather to criminal procedure than to evidence. Again, in every branch of Substantive Law there are presumptions more or less numerous and important, which can be understood only in connection with those branches of the law. Such are the presumptions as to the ownership of property, as to consideration for a bill of exchange, as to many of the incidents of the contract of insurance. Passing over all these, I have embodied in Chapter XIV those presumptions only which bear upon the proof of facts likely to be proved on a great variety of different occasions, and those estoppels only which arise out of matters of fact, as distinguished from those which arise upon deeds or judgments.

A concise statement of the law relating to the burden of proof is hampered by the metaphor, now permanently embedded in the law, that proof is a burden that may be shifted from one party to the other. The metaphor is vivid, and is perfectly correct so long as it is remembered that the obligation to prove something is all that is shifted. But when shifting a burden is mentioned it sounds as though one party gave up and the other accepted the same burden, which is not at all what the legal phrase means. If the metaphor could be varied so as to indicate that a plaintiff or a prosecutor must carry a burden to a particular, but often an unascertainable, point, and that if the defendant or accused carries a different burden to a different, but generally unascertainable, point, the plaintiff or prosecutor must carry his burden to a further point, it would serve a useful purpose. But if this could be done the metaphor could not be as brief and complete as the assertion of the simple principle that he who asserts must prove; particularly when in criminal cases it is combined with the principle that the guilt of the accused must be proved beyond reasonable doubt, and that the jury are the sole judges as to whether this has been done. In *R. v. Schama & Abramovitch*, 1915, 112 L.T. 480, the accused were charged with receiving goods knowing them to have been stolen: and this the prosecution had to prove beyond reasonable doubt. They gave evidence that the accused were in possession of the goods soon after they had been stolen, which is by law good evidence of the offence charged, but it did not follow that the jury would accept this proof as beyond reasonable doubt. The accused were therefore at liberty to prove, if they could, that reasonable doubt existed, and if they could do so to the satisfaction of the jury would be entitled to be acquitted.

This Schama attempted to do in the usual way by proving that he received the goods in the ordinary way of legitimate trade. Whether the prosecution had succeeded in proving Schama's guilt beyond reasonable doubt in spite of the evidence produced by Schama could only be determined by the verdict of the jury, which is why Lord Reading said that the burden of proof "always rests on the prosecution and never changes".<sup>1</sup> And the same might be said of the burden of proving the existence of reasonable doubt undertaken by the accused. The same point is enforced by Lord Sankey, in *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462 at p. 480, where he points out in substance that the effect to be given to evidence is always a question for the jury alone. It would seem that the decision of the House of Lords in this case may render it possible to simplify the rather involved direction to juries which became obligatory upon judges under Schama's case. Both decisions can be based on the principle that he who asserts must prove, and support the suggestion that the metaphor that proof is a burden that can be discharged or shifted leads to confusion. The same reasoning holds good in civil cases, subject to the rules that what is admitted in pleadings or otherwise need not be proved, and subject to the effect of certain presumptions, e.g. that the endorsement of a bill of exchange was for value, that a gift by a client to his solicitor was not made in good faith, that a ditch adjoining a hedge belongs to the owner of the hedge, that a ship that has not been heard of for a certain time has been lost, and so on.

As to the subject generally see Taylor, ss. 364-380; Best, ss. 265-277; Halsbury, xiii. pp. 542-548.

<sup>1</sup> This passage does not occur in the Law Journal report, 84 L.J. (K.B.) 396, but is quite consistent with it.

## NOTE XVII

(TO ARTICLES III-III4.—ESTOPPELS IN PAIS)

These Articles embody the principal cases of estoppels *in pais*, as distinguished from estoppels by deed and by record. As they may be applied in a great variety of ways and to infinitely various circumstances, the application of these rules has involved a good deal of detail. The rules themselves appear clearly enough on a careful examination of the cases. The latest and most extensive collection of cases is to be seen in 2 S.L.C. 765, where the cases referred to in the text and many others are abstracted. See, too, Taylor, ss. 101-103, 774-782; Best, s. 543; Phipson, 638-660.

Article III contains the rule in *Pickard v. Sears*, 1837, 6 A. & E. at p. 474, as interpreted and limited by Parke, B., in *Freeman v. Cooke*, 1848, 2 Ex. 654, 663. The second paragraph of the Article is founded on the application of this rule to the case of a negligent act causing fraud. The rule, as expressed, is collected from a comparison of the following cases: *Bank of Ireland v. Evans*, 1855, 5 H.L.Ca. 389; *Swan v. North British Australasian Company*, which was before three Courts, see 1859, 7 C.B. (N.S.) 400; 1862, 7 H. & N. 603; 1863, 2 H. & C. 175, where the judgment of the majority of the Court of Exchequer was reversed; and *Halifax Guardians v. Wheelwright*, 1875, L.R. 10 Ex. 183, in which all the cases are referred to. All of these refer to *Young v. Grote*, 1827, 4 Bing. 253, and its authority has always been upheld, though not always on the same ground, and is now established by being approved in *London Joint Stock Bank v. Macmillan*, [1918] A.C. 777. The rules on this subject are stated in general terms in *Carr v. L. & N.W. Railway*, 1875, 10 C.P. 316-317.

It would be difficult to find a better illustration of the gradual way in which the judges construct rules of evidence, as circumstances require it, than is afforded by a study of these cases.

### NOTE XVIII

#### (To CHAPTER XV.—COMPETENCY OF WITNESSES)<sup>1</sup>

The law as to the competency of witnesses was formerly the most, or nearly the most, important and extensive branch of the Law of Evidence. Indeed, rules as to the incompetency of witnesses, as to the proof of documents, and as to the proof of some particular issues, are nearly the only rules of evidence treated of in the older authorities. Great part of Bentham's *Rationale of Judicial Evidence* is directed to an exposure of the fundamentally erroneous nature of the theory upon which these rules were founded; and his attack upon them has met with a success so nearly complete that it has itself become obsolete. The history of the subject is to be found in Best, ss. 132-188. See, too, Taylor, ss. 1342-1393, and Roscoe, 165-167.

### NOTE XIX

#### (To ARTICLE 117.—COMPETENCY IN CRIMINAL CASES)

At Common Law the parties and their husbands and wives were incompetent in all cases. This incompetency was removed as to the parties in civil, but not in criminal, cases by 14 & 15 Vict. c. 99, s. 2; and as to their husbands and wives, by 16 & 17 Vict. c. 83, ss. 1, 2. But sect. 2 expressly reserved the Common Law as to criminal cases and proceedings instituted in consequence of adultery.

The repealing by 32 & 33 Vict. c. 68, s. 3, of the words relating to adultery is the authority for Article 118. That Act is now replaced by 15 & 16 Geo. 5, c. 49 (Judicature (Consolidation) Act, 1925), s. 198, so far as relates to the High Court.

Persons interested and persons who had been convicted of certain crimes were also incompetent witnesses, but their incompetency was removed by 6 & 7 Vict. c. 85.

The Criminal Evidence Act, 1898, has removed the incompetency of an accused person and his or her wife or husband to the extent mentioned in the text. The law on the subject cannot, however, be correctly stated without reference to the old Common Law Rule.

#### NOTE XX

##### (TO ARTICLE 120.—PRIVILEGE OF JUDGES AND ADVOCATES)

The cases on which these Articles are founded are only *Nisi Prius* decisions; but as they are quoted by writers of eminence, I have referred to them.

In the trial of Lord Thanet, for an attempt to rescue Arthur O'Connor, Serjeant Shepherd, one of the special commissioners, before whom the riot took place in Court at Maidstone, gave evidence, *R. v. Lord Thanet*, 1799, 27 S.T. at p. 836.

I have myself been called as a witness on a trial for perjury to prove what was said before me when sitting as an arbitrator. The trial took place before Mr. Justice Hayes at York, in 1869. See, however, Article 135. See, too, *Bourgeois v. Weddell & Co.*, [1924] 1 K.B. 539, as to the position of arbitrators in commercial cases.

As to the case of an advocate giving evidence in the

course of a trial in which he is professionally engaged, see several cases cited and discussed in Best, ss. 184-186.

In addition to those cases, reference may be made to the trial of Horne Tooke for a libel in 1777, when he proposed to call the Attorney-General (Lord Thurlow), 20 S.T. at p. 740. These cases do not appear to show more than that, as a rule, it is for obvious reasons improper that those who conduct a case as advocates should be called as witnesses in it. Cases, however, might occur in which it might be absolutely necessary to do so. For instance, a solicitor engaged as an advocate might, not at all improbably, be the attesting witness to a deed or will.

#### NOTE XXI

##### (To ARTICLE 126.—PRIVILEGE OF CLERGYMEN AND PRIESTS)

The question whether clergymen, and particularly whether Roman Catholic priests, can be compelled to disclose confessions made to them professionally, has never been solemnly decided in England, though it is stated by the text writers that they can. See Taylor, ss. 916-917; Roscoe, 176; Roscoe, Cr. Ev. 178. The question is discussed at some length in Best, ss. 583-584; and a pamphlet was written to maintain the existence of the privilege by Mr. Baddley in 1865. Mr. Best shows clearly that none of the decided cases are directly in point, except *Butler v. Moore*, 1802, MacNally, Ev., 253-254, and possibly *R. v. Sparkes*, which was cited by Garrow in arguing *Du Barré v. Livette* before Lord Kenyon, 1791, 1 Pea. 108. The report of his argument is in these words: "The prisoner being a Papist, had made a confession before a Protestant clergyman of the crime for which he was indicted; and that

confession was permitted to be given in evidence on the trial" (before Buller, J.), "and he was convicted and executed". The report is of no value, resting as it does on Peake's note of Garrow's statement of a case in which he was probably not personally concerned; and it does not appear how the objection was taken, or whether the matter was ever argued. Lord Kenyon, however, is said to have observed: "I should have paused before I admitted the evidence there admitted".

Mr. Baddeley's argument is, in a few words, that the privilege must have been recognised when the Roman Catholic religion was established by law, and that it has never been taken away.

I think that the modern Law of Evidence is not so old as the Reformation, but has grown up by the practice of the Courts, and by decisions in the course of the last two centuries. It came into existence at a time when exceptions in favour of auricular confessions to Roman Catholic priests were not likely to be made. The general rule is that every person must testify to what he knows. An exception to the general rule has been established in regard to legal advisers, but there is nothing to show that it extends to clergymen, and it is usually so stated as not to include them. This is the ground on which the Irish Master of the Rolls (Sir Michael Smith) decided the case of *Butler v. Moore (supra)*. It was a demurrer to a rule to administer interrogatories to a Roman Catholic priest as to matter which he said he knew, if at all, professionally only. The judge said: "It was the undoubted legal constitutional right of every subject of the realm who has a cause depending, to call upon a fellow-subject to testify what he may know of the matters in issue; and every man is bound to make the discovery, unless specially exempted and

protected by law. It was candidly admitted that no special exemption could be shown in the present instance, and analogous cases and principles alone were relied upon." The analogy, however, was not considered sufficiently strong.

Several judges have, for obvious reasons, expressed the strongest disinclination to compel such a disclosure. Thus Best, C.J., said: "I, for one, will never compel a clergyman to disclose communications made to him by a prisoner; but if he chooses to disclose them I shall receive them in evidence" (*obiter*, in *Broad v. Pitt*, 1828, 3 C. & P. 518). Alderson, B., thought (rather, it would seem, as a matter of good feeling than as a matter of positive law) that such evidence should not be given: *R. v. Griffin*, 1853, 6 Cox, Cr. Ca. 219. A decision of the question of privilege in the case of a confession made to a Roman Catholic priest was avoided in the trial of Orton, when a priest when asked whether Sir Roger Tieborne had not confessed the commission of adultery to him, replied that, while nothing should force him to reveal what had been confessed he had no hesitation in swearing that the confession in question had not been made. No privilege attaches to a confession of adultery made to a parish priest in ordinary conversation: *Normanshaw v. Normanshaw*, 1893, 69 L.T. 468.

#### NOTE XXII

(To ARTICLE 141.—LIMITS OF CROSS-EXAMINATION)

This Article states a practice which is now common, and which never was more strikingly illustrated than in the case referred to in the illustration. But the practice which it represents is modern; and I submit that it requires the qualification suggested in the text. I shall not

believe, unless and until it is so decided upon solemn argument, that by the law of England a person who is called to prove a minor fact, not really disputed, in a case of little importance, thereby exposes himself to having every transaction of his past life, however private, inquired into by persons who may wish to serve the basest purposes of fraud or revenge by doing so. Suppose, for instance, a medical man were called to prove the fact that a slight wound had been inflicted, and been attended to by him, would it be lawful, under pretence of testing his credit, to compel him to answer upon oath a series of questions as to his private affairs, extending over many years, and tending to expose transactions of the most delicate and secret kind, in which the fortune and character of other persons might be involved? If this is the law, it should be altered.<sup>1</sup>

O. xxxvi, r. 38, expressly gives the judge a discretion which was much wanted, and which I believe he always possessed.

For the guidance of counsel in cross-examining to credit the Bar Council has laid down the following rules: (1) Before asking the question counsel should be reasonably satisfied that the imputation conveyed by the question is true. (2) He is entitled on that point to accept the word of his solicitor if the solicitor vouches his own personal belief in its truth and does not merely state that he has been instructed to have the question put. (3) Statements coming from persons other than the solicitor are not to be accepted as conclusive and counsel should ascertain, before putting the question, that there are satisfactory reasons for making the statement. (4) Such questions,

<sup>1</sup> The author's view, in 1872, of what the law on this subject should be may be seen by a reference to s. 148 of the Indian Evidence Act (I of 1872).

irrespective of the truth of the imputation conveyed, should not be put unless in the opinion of counsel the answers would materially affect the witness's credibility, and in deciding on this he should have regard to the character of the matter imputed and its remoteness in time. (5) Counsel should guard against being made the channel for questions which are only intended to insult or annoy the witness or any other person, and he must exercise his own judgment both as to the form and substance of his questions.<sup>1</sup>

#### NOTE XXIII

##### (TO ARTICLES 144-146.—STATEMENTS INCONSISTENT WITH PRESENT TESTIMONY)

The contents of this section are intended to represent ss. 3, 4, and 5 of the Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), which re-enacted ss. 22, 23, and 24 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), now repealed by the Statute Law Revision Act, 1892. The three sections in question are as follows:

“3. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

“4. If a witness, upon cross-examination as to a former

<sup>1</sup> Annual Statement, 1917, p. 7.

statement made by him relative to the subject-matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

"5. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing relative to the subject-matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit."

The sections are obviously ill-arranged; but apart from this, sect. 3 is so worded as to suggest a doubt whether a party to an action has a right to contradict a witness called by himself whose testimony is adverse to his interests. The words, "he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence", suggest that he cannot do so unless the judge is of that opinion. This is not, and never was, the law. In *Greenhough v. Eccles*, 1859, 5 C.B. (N.S.) at p. 802, Williams, J., says: "The law was clear that you might not discredit your own witness by general evidence

of bad character; but you might, nevertheless, contradict him by other evidence relevant to the issue"; and he adds, at p. 803: "It is impossible to suppose that the Legislature could have really intended to impose any fetter whatever on the right of a party to contradict his own witness by other evidence relevant to the issue—a right not only established by authority, but founded on the plainest good sense".

Cockburn, L.C.J., in the same case, at p. 806, said of the 22nd section of the Common Law Procedure Act, 1854: "There has been a great blunder in the drawing of it, and on the part of those who adopted it. . . . Perhaps the better course is to consider the second branch of the section as 'altogether superfluous and useless'" (p. 806). On this authority I have omitted it.

For many years before the Common Law Procedure Act of 1854 it was held, in accordance with *Queen Caroline's Case*, 1820, 2 Br. & Bing. 286-291, that a witness could not be cross-examined as to statements made in writing, unless the writing had been first proved. The effect of this rule in criminal cases was that a witness could not be cross-examined as to what he had said before the magistrates without putting in his deposition, and this gave the prosecuting counsel the reply. Upon this subject rules of practice were issued by the judges in 1837, when the Prisoner's Counsel Act came into operation. The rules are published in 7 C. & P. 676. They would appear to have been superseded by the Criminal Procedure Act, 1865, s. 5.

The common law was strictly logical in taking the view that until and unless the witness admitted that he made the document, or this had been otherwise proved, the document was non-existent as evidence and might not

be referred to or assumed to exist. The rule, however, worked unfairly both to the cross-examiner and the witness. The cross-examiner had to begin by disclosing the document, which might have disastrous effects; on the other hand, having once put the document to the witness he was not obliged to give him any opportunity of explaining it (*Queen Caroline's Case, supra*) even if he admitted making it (see *Wills*, 339). Similarly, if he denied making it, his opponent could prove it in his own evidence without obeying the rule of fairness that a party's case must be put to his opponent's witnesses to deal with.

#### NOTE XXIV

##### (To ARTICLE 147.—HOSTILE WITNESSES)

The law as to hostile witnesses has been developed in a way which leads to an appearance of confusion in its statement. But it is based on a simple principle, which is that when a litigant calls a witness he puts him forward as a witness of truth, that is, as one whose evidence will be true and entitled to credit. On the other hand, it would obviously be unjust to put a party at the mercy of an unscrupulous witness by committing him irrevocably to whatever his witness might say and accordingly, if he is betrayed by the witness giving evidence adverse to his interests that he could not reasonably have anticipated, he may call evidence to show that such adverse evidence is untrue or may cross-examine him in the usual way. Such cross-examination may go as far as suggesting that he has been bribed or is acting on some other dishonest motive. But the party who has called the witness is not to attempt to show either by calling another witness or by cross-examination that he is unworthy of credit

generally, as by showing that he has a bad character or has been previously convicted. He produced the witness as a witness of truth, and he cannot recede from this position. A witness is not to be treated as hostile only because he fails to prove what he was expected to prove or makes damaging admissions; nor because he is, either for good or bad reasons, biased against the party who called him. The matter is illuminated by a passage in the judgments in *Melhuish v. Collier*, 1850, 15 Q.B. 878. At p. 890 Erle, C.J., says: "I think that question [viz.: had the witness made a previous inconsistent statement] is proper, and not inconsistent with the rule that a party knowing a witness to be infamous ought not to produce him, and must not be allowed to take the chance of his answers and then bring evidence to contradict him. We do not interfere with that rule. There are treacherous witnesses who will hold out that they can prove facts on one side in a cause and then, for a bribe or for some other motive, make statements in support of the opposite interest. In such cases the law undoubtedly ought to permit the party calling the witness to question him as to the former statement, and ascertain, if possible, what induces him to change it."

#### NOTE XXV

##### (STATUTE LAW)

The Statute Law relating to the subject of evidence may be regarded as voluminous or not, according to the view taken of the extent of the subject. Numerous statutes dealing with other subjects contain provisions relating to evidence in particular cases. Some of these, as may be seen from the Table of Statutes, have been considered important enough to be noticed in this work. Many more

have not; for example, many sections of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), or the curious enactment contained in the Gas Regulation Act, 1920 (10 & 11 Geo. 5, c. 28), s. 6.

The Acts which relate directly to the subject of evidence as defined in the Introduction to this work are as follows:

1. The Witnesses Act, 1806 (46 Geo. 3, c. 37), declaring that a witness is not excused from answering a question that may fix him with a civil liability (Article 129).

2. The Evidence Act, 1843 (6 & 7 Vict. c. 85), abolishing incompetency from interest or crime (Article 115).

3. The Evidence Act, 1845 (8 & 9 Vict. c. 113), s. 1, by which proof of authentication of certain signatures is not needed (Article 83); s. 2, as to judicial notice of certain matters (Article 61); s. 3, as to proof of Acts of Parliament, proclamations, etc., by King's Printers' copies (Article 85).

4. The Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 2, making parties competent and compellable witnesses except in certain cases (Articles 115, 117); s. 7, providing for the proof of proclamations, treaties, etc. (Article 88); ss. 9-11, as to documents admissible in H.M.'s dominions without proof of seal, etc. (Article 84); s. 14, certain documents provable by examined or certified copies (Article 83); s. 16, who may administer oaths (Article 136); s. 19, meaning of "Colony" (Article 84).

5. The Evidence Amendment Act, 1853 (16 & 17 Vict. c. 83), s. 1, making husband and wife competent and compellable witnesses (comprised in Article 115); s. 3, protecting communications between them (Article 119).

6. The Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 3, providing how far a party may discredit his own

witnesses (Article 147, and Note XXIV); s. 4, as to proof of contradictory statements by a witness under cross-examination (Article 144); s. 5, as to cross-examination on previous statements in writing (Article 145); s. 6, proof of previous conviction of a witness (Article 143 (1)); s. 7, attesting witnesses not necessary unless attestation required by law (Article 72, but see *infra*, Evidence Act, 1938); s. 8, as to comparison of handwriting (Articles 50 and 53).

7. The Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), s. 2, certain documents provable in particular ways (Article 87); s. 3, the Act to be in force in the colonies (Article 87); s. 5, interpretation clauses (embodied in Article 87); s. 6, the Act to be cumulative upon Common Law (implied in Article 77).

8. The Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), s. 2, making parties in actions for breach of promise competent (*quaere*, compellable also?), but requiring corroboration (Articles 113, 130).

9. The Oaths Act, 1888 (51 & 52 Vict. c. 46), s. 1, allows a person who objects to be sworn to make an affirmation, in the form given in s. 2 (Article 133); s. 3, oath valid though religious belief lacking (*ibid.*)

10. The Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1, making a person charged with an offence and his wife or her husband competent, and, s. 4, in certain cases, compellable witnesses (Article 117).

11. The Foreign, Dominion and Colonial Documents Act, 1933 (23 Geo. 5, c. 4), s. 3, how entries in public registers of certain countries abroad are proved (Article 89).

12. The Children and Young Persons Act, 1933 (23 Geo. 5, c. 12), s. 38 (1) & (2), by which evidence of a child or young person may be given in criminal cases not upon

oath, but must be corroborated (Articles 130, 134).

13. The Evidence Act, 1938 (1 & 2 Geo. 6, c. 28), s. 1, makes admissible, under certain conditions in civil actions, hearsay matter contained in documents (Article 154); s. 3 alters the period for ancient documents (Article 73) from thirty years to twenty; s. 4 further simplifies the proof of attested documents (Article 69A).

## APPENDIX A

### LEGAL RELEVANCE IN ITS RELATION TO THE THEORY OF LOGIC

THE author in several places, especially in his Introduction to this work and his Introduction to the Indian Evidence Act (I. of 1872), expressed his strong conviction that the English Law of Evidence, so far from being a mere jumble of indigestible rules, could legitimately be regarded, if allowance was made for certain exceptions imposed on it by the practical nature of the subject, as embodying a definite logical theory of relevancy. It is clear from their writings that the pioneers in the work of systematising the law of evidence (in which distinguished company the author holds an important place) were firmly convinced that inside the apparently shapeless mass of rules there was a rigid framework of logical structure.

As was natural in the circumstances of their time, lawyers in the middle of the nineteenth century turned readily to J. S. Mill for guidance; the author (Introduction, p. xii) expressly acknowledges his debt to Mill. At the present day, nearly one hundred years after the publication of Mill's *Logic*, his prestige has declined so far (perhaps to an undue extent) that attempts to bring the subject into relation with his theories have lost most of their interest. Having regard to the great change which logical theory has undergone in recent times it is curious that so far no serious attempt has been made to consider the relation of logic and evidence in the light of subsequent developments. In the circumstances a short dis-

cussion of some considerations arising out of the modern position may be not without interest.

Unlike purely scientific investigation, which, with good reason, has attracted continuous attention from professional logicians, the business of a trial in a court of law necessarily falls far short of being a logically coherent whole, so that it tends to defy theoretical analysis and is therefore superficially a less attractive subject for logical study. To begin with, the body of "facts in issue" is determined wholly by substantive law. The list of ingredients that go to make up the crime of burglary or the tort of false imprisonment are settled by law, not by logic. Next, there is in the law of evidence a large body of rules dealing with the mode in which evidence is to be adduced. This is a matter of procedure rather than logic. The well-known rule of the Best Evidence declares that evidence must be brought before the Court in the form and by the channels which give the best guarantee of its credibility that the circumstances of the case admit. In practice the law under this head largely consists of rules by which, under proper safeguards, the need for adducing what is ideally the best evidence may in certain cases be relaxed. This branch of the subject, which is admittedly of the highest importance, corresponds to the devices of the man of science for securing that his measurements and statistics of data shall be as reliable as possible.

When we come, however, to the cardinal rule governing the admissibility of evidence, which is that evidence must be *Relevant*, we are in a field which is strictly logical in character. Evidence cannot be legally relevant unless it is logically probative of the facts in issue in the case. It is quite true that the Digest often uses the phrase "deemed to be relevant" but it is submitted that this is

not to be taken as implying that the law resorts for proofs to matters which have no logical cogency. Rather it is the case that the word "deemed" imports in the case of some of the most obvious types of probative material that the law has established a working rule to the effect that certain types of probative connection, having been stereotyped are admitted without any discussion upon their degree of cogency in particular cases. As a practical matter, also, it is to be borne in mind that it is impossible to foresee exactly the course of a trial and certain matters must be admitted, within carefully defined limits, in the mere expectation of their acquiring probative force. Statements made to a person taxing him with having committed an offence are a good example. If by his words and demeanour he satisfactorily repulses the charge, the evidential value of the fact of the statement having been put to him is reduced to nothing. Until, however, all the facts are in evidence, it is not possible to pronounce on this and accordingly the statement is, by the rule of law, admitted provisionally.

Putting aside these special difficulties it may be said that legal relevance is never wider than logical relevance. In cases not covered by settled rules establishing the relevancy of particular types of probative material, the real question which the Court has always to consider is whether the evidence tendered *can* have a logical bearing on the facts in issue.

In sharp contrast to the question whether legal relevance can be *wider* than logical, stands the question: can legal relevance be *narrower* than logical? Here the law of evidence to a limited extent parts company with logic and introduces a set of logically arbitrary rules based entirely on the practical social policy of the law. The best

known example is that the bad character of the prisoner is deemed to be irrelevant except in certain cases. The layman who is called to serve on a jury is instinctively right when, upon learning after verdict for the first time that the prisoner has a long record of previous convictions, he takes the view that something highly probative of present guilt has been withheld from him. This is not the place to explain and justify the salutary policy of the law. Suffice it to say that it has nothing to do with logic. These rules restrictive of legal relevance, though important, are not very numerous and form no real obstacle to regarding the subject as a matter of logic.

Turning now to the theories of pure logic, it is perhaps right to begin with Aristotle, the founder of logic but not (as has been properly observed) of logical thinking. The attacks of the New Learning, led by an eminent lawyer, Francis Bacon, having spent their force, Aristotle has lately been reinstated in his proper position and should be carefully considered *in relation to our subject*. There is, he says, all the difference between knowing the *ότι* (the bare fact) and the *διότι* (the reasoned fact).<sup>1</sup> Again we "know", in the full sense of the word, when we know the reason why a thing exists.<sup>2</sup> The full answer is a combination of four types of reason or "cause" set out in the doctrine of the Four Causes;<sup>3</sup> namely, material cause, formal cause, final cause, and efficient cause.

It is unfortunate that lawyers in their reasoning have tended to take over the narrow and unsound view expounded by Mill that only the efficient cause is of any importance. Of recent years, however, the latinised Aristotelian terminology of St. Thomas Aquinas (*causa*

<sup>1</sup> Aristotle, *Posterior Analytics*, I. xiii.

<sup>2</sup> *Ibid.* I. iii.

<sup>3</sup> *Ibid.* II. xi.

*causans, causa sine qua non*, etc.) has begun to appear in the law reports with considerable advantage to legal theories of causality.

Causality, in a wide or narrow sense, is a conception which plays a part in the reasoning of substantive law, for example in discussions on proximate cause of damage such as the well-known *Polemis* case.<sup>1</sup> It is also of great importance in the theory of Relevancy. "We know when we know the cause" is directly applicable to legal proof. The facts in issue are only truly *known* to exist when seen as connected with the surrounding body of fact which makes up the four "causes" giving the reason why the facts in issue exist. The body of relevant facts exemplifies, in its relationship to the facts in issue, every one of these four causes. The material "cause" <sup>2</sup> is the general body of surrounding circumstances in which the actual facts in issue are a potential event which may or may not emerge. The formal "cause" is the general type of occurrence of which the actual facts in issue are a particular example. The efficient cause is the well-known "*causa causans*" of the law reports, that event the happening of which sets in motion the forces that produce the events under consideration. The final "cause" is the motive of the agent or the state of things which he wants to realise, be it good or bad. In a perfectly established case of causal (in the wide Aristotelian sense) interdependence we can reason both from effect to cause and from cause to effect: if one exists the other exists, or in the language of Aristotle, their interdependence is reciprocal and convertible. So, in evidence, we may infer the existence of the facts in issue by

<sup>1</sup> *In re Polemis & Furness, Withy & Co.*, [1921] 3 K.B. 560 (C.A.).

<sup>2</sup> Readers of Aristotle will recollect the inconvenience of using this word to render the Greek *aitia*, since it is really only appropriate to efficient "cause".

sccing them either as effects or as causes of the surrounding body of probative fact.

With regard to modern logic, it may be said, at the outset, that little assistance is to be got from Symbolic Logic of the type of Bertrand Russell or Johnson. As Aristotle very soundly remarks, it is the mark of the educated man to appreciate what degree of certainty the subject in hand admits of.<sup>1</sup> All proof cannot rise to the level of demonstrative certainty. It would be absurd for the mathematician to be content with the merely plausible and equally so to demand demonstrative certainty of the political theorist, or, one may add, of the advocate in a cause. Ill-informed outside criticism is too prone to suggest that judicial methods if "scientifically" treated could yield the kind of certainty that exists in physical science. Judicial inference varies greatly in strength; only long and mature experience can give a true appreciation of what weight is to be attached to different types of proof. Symbolic logic attains an air of demonstrative certainty by a fallacious over-simplification of data which is highly misleading and renders it totally unsuitable for adaptation to the logic of law.

A very different view of logic took its rise in Germany about sixty years ago in the works of Lotze and Sigwart. It is ably represented in this country by Bradley and Bosanquet. For them the basic fact of all inference is the existence of different types of orderly behaviour to be found in the world. They reject the use made of classes by the old formal logic which treated inference as a matter of showing how one class comprised all the members of another, or none of them, and so forth. The real world is not amenable to any such simple device as this. In its

<sup>1</sup> Aristotle, *Nic. Ethics*, I.

place, what they are studying may be described as the investigation of how the fact that A-ness necessitates B-ness is exemplified in particular cases of A necessitating B; that is to say, they are concerned with the correlation of particular and universal as applied not to static "things" but to dynamic "processes", "activities" and kinds of behaviour. In each of these things, there exists both a general type or "law" and particular examples of it, each exhibiting its own special peculiarities. Every sort of activity is included, ranging from the laws of chemical change to broad generalisations about the workings of human nature, such as the behaviour of a guilty man or the conduct to be expected of a putative father.

Bosanquet defines inference as "the indirect reference to reality of differences within a universal by means of the exhibition of the universal in differences directly referred to reality".<sup>1</sup> In other words, show that you have set up a valid law of behaviour and you can then show the various actions of the particular individual as being what you would expect in such a case.

Now relevance is simply the logic of inference in a specialised form. The above definition, expressed in the technical language of the logician, indicates just what is asked of proof by evidence. It aims at relating the facts in issue to a wide surrounding field and then showing that there is implicit in that field some perfectly general law of behaviour. These laws are extremely various and of widely differing certainty, but in every case the principle is the same. The facts in issue are shown to be the conclusion which arises inferentially from the surrounding data; the cogency of the inference arises from its revealing the operation in the particular case of some general law of

<sup>1</sup> Bosanquet's *Logic*, ii. p. 3.

behaviour. By exhibiting the facts in issue inferentially or as "reasoned facts" we justify our desire to have their existence believed in. Inference is, of course, always at work in our thoughts, though with varying degrees of explicitness and elaboration, and accordingly, the presentation of a case always involves inference but in varying degrees of prominence.

The law of evidence takes proper account of the fact that inference enters into practically all thinking; but it does so in a way which may appear somewhat artificial and calculated to obscure the logical processes at work. Witnesses are carefully prevented (except in a few cases) from speaking to matters of inference: they are to speak to facts only and it is for the Court to draw ~~any~~ inferences it thinks fit. Thus, where A is charged with stealing B's watch, an eye-witness will not be permitted to say "A stole B's watch". The crime of stealing is only committed where both the offender and his victim are in a certain state of mind whose existence is purely a matter of inference. The witness cannot himself draw the inference but must confine himself to stating the facts which suggest it. Thus he says that A walked stealthily up to B and snatched the watch and ran away and that B on losing it cried out "Stop thief". The inferences arising from these details are those required to complete the establishment of the fact that the crime was committed. The witness deposes to the physical fact of the taking and speaks to facts which raise the inferences that the thief meant to deprive the owner permanently and that the owner lost his watch against his will.

The law, in imposing this rigid distinction between the witness's province of speaking to fact and the Court's province of drawing inferences, is paying regard to an

important distinction that has to be made between two different stages in a judicial ascertainment of the truth. It is first necessary to arrive at a conclusion as to the capacity and opportunities for observation possessed by the witness and as to his honesty of purpose. It is necessary to decide whether the data do in fact exist. Having decided that they do, a different sort of question arises in considering what inferences they suggest and how certain those inferential conclusions are. This is primarily a matter of logic. The court jealously reserves to itself this latter function and the law prohibits witnesses from giving what text-book writers usually call "opinions". The term is unfortunate because it means one thing for the lawyer and another for the logician. An opinion, for logic, means a subjective conviction and often an irrational one: it does not mean a categorical conclusion arrived at by rational inference. The lawyer means by an opinion any statement which does not represent direct perception; it may vary from mere belief founded on no grounds at all to the fully reasoned conclusion of the scientific expert. The law rejects opinions (except in the case of experts) not so much on the ground that they may be erroneous as because it wishes to know what are the premises on which the opinion is founded so that it may judge whether the witness knows those premises to be true and what is the strength of the inference arising from them. With regard to the expert, the law requires the data on which his inference is founded either to be the fruits of his own observation or to have been proved to exist by the direct (*i.e.* perceptual) testimony of some other witness. In matters of science and art the expert witness states what inference arises from his data and the Court then appraises its cogency. In the case of ordinary (*i.e.* non-scientific

facts) the witness only states the facts and the Court draws the inference. Such is the theory of the law. It is, perhaps, fair to add that many logicians feel a difficulty in drawing such a hard and fast line between fact and inference as is done by lawyers.

In view of the distinction which the law of evidence makes between fact and inference it will readily be seen that in the English system the advocate has an important part to play even from the point of view of pure logic. Contrary to the popular view, by no means the least important part of his duty consists in showing to the jury the way in which the facts of his own case follow inferentially from the surrounding data and the assertions of his adversary are negatived by the same line of reasoning. It is for the party's witnesses (including himself) to prove the data and for his advocate to suggest the inferences arising from them.

It may therefore be fairly claimed that the operation of proving a case by evidence is simply a specialised example of the process of claiming credit for a conclusion by exhibiting it as the inferential outcome of a set of data. The conclusion is the facts in issue and the data are the facts relevant to the facts in issue or probative facts.

L. F. S.

## APPENDIX B

### EVIDENCE ACT 1938

(1 & 2 Geo. 6, c. 28)

#### AN ACT TO AMEND THE LAW OF EVIDENCE (26TH MAY 1938)

*Admissibility of documentary evidence as to facts in issue*

1.—(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—

(i) if the maker of the statement either—

(a) had personal knowledge of the matters dealt with by the statement; or

(b) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(ii) if the maker of the statement is called as a witness in the proceedings;

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

(2) In any civil proceedings, the Court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) of this section shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence—

- (a) notwithstanding that the maker of the statement is available but is not called as a witness;
- (b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the Court may approve, as the case may be.

(3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

(4) For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognised by him in writing as one for the accuracy of which he is responsible.

(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of the foregoing provisions, the Court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner, and where the proceedings are with a jury, the Court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted.

*Weight to be attached to evidence*

2.—(1) In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts.

(2) For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible as evidence by this Act shall not be treated as corroboration of evidence given by the maker of the statement.

*Proof of instrument to validity of which attestation is necessary*

3. Subject as hereinafter provided, in any proceedings, whether civil or criminal, an instrument to the validity of which attestation is requisite may, instead of being proved by an attesting witness, be proved in the manner in which it might be proved if no attesting witness were alive:

Provided that nothing in this section shall apply to the proof of wills or other testamentary documents.

*Presumption as to documents twenty years old*

4. In any proceedings, whether civil or criminal, there shall, in the case of a document proved, or purporting, to be not less than twenty years old, be made any presumption which immediately before the commencement of this Act would have been made in the case of a document of like character proved, or purporting, to be not less than thirty years old.

*Explanation of s. 99 of 15 & 16 Geo. 5. c. 49 and  
s. 99 of 24 & 25 Geo. 5. c. 53*

5. It is hereby declared that section ninety-nine of the Supreme Court of Judicature (Consolidation) Act, 1925, and section ninety-nine of the County Courts Act, 1934 (which relate to the making of rules of court), authorise the making of rules of court providing for orders being made at any stage of any proceedings directing that specified facts may be proved at the trial by affidavit with or without the attendance of the deponent for cross-examination, notwithstanding that a party desires his attendance for cross-examination and that he can be produced for that purpose.

*Interpretation and savings*

6.—(1) In this Act—

“Document” includes books, maps, plans, drawings and photographs;  
“Statement” includes any representation of fact, whether made in words or otherwise;  
“Proceedings” includes arbitrations and references, and  
“Court” shall be construed accordingly.

(2) Nothing in this Act shall—

- (a) prejudice the admissibility of any evidence which would apart from the provisions of this Act be admissible; or
- (b) enable documentary evidence to be given as to any declaration relating to a matter of pedigree, if that declaration would not have been admissible as evidence if this Act had not passed.

*Short title, extent and commencement*

7.—(1) This Act may be cited as the Evidence Act, 1938.

(2) This Act shall not extend to Scotland or Northern Ireland.

(3) This Act shall come into operation on the first day of September nineteen hundred and thirty-eight.

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